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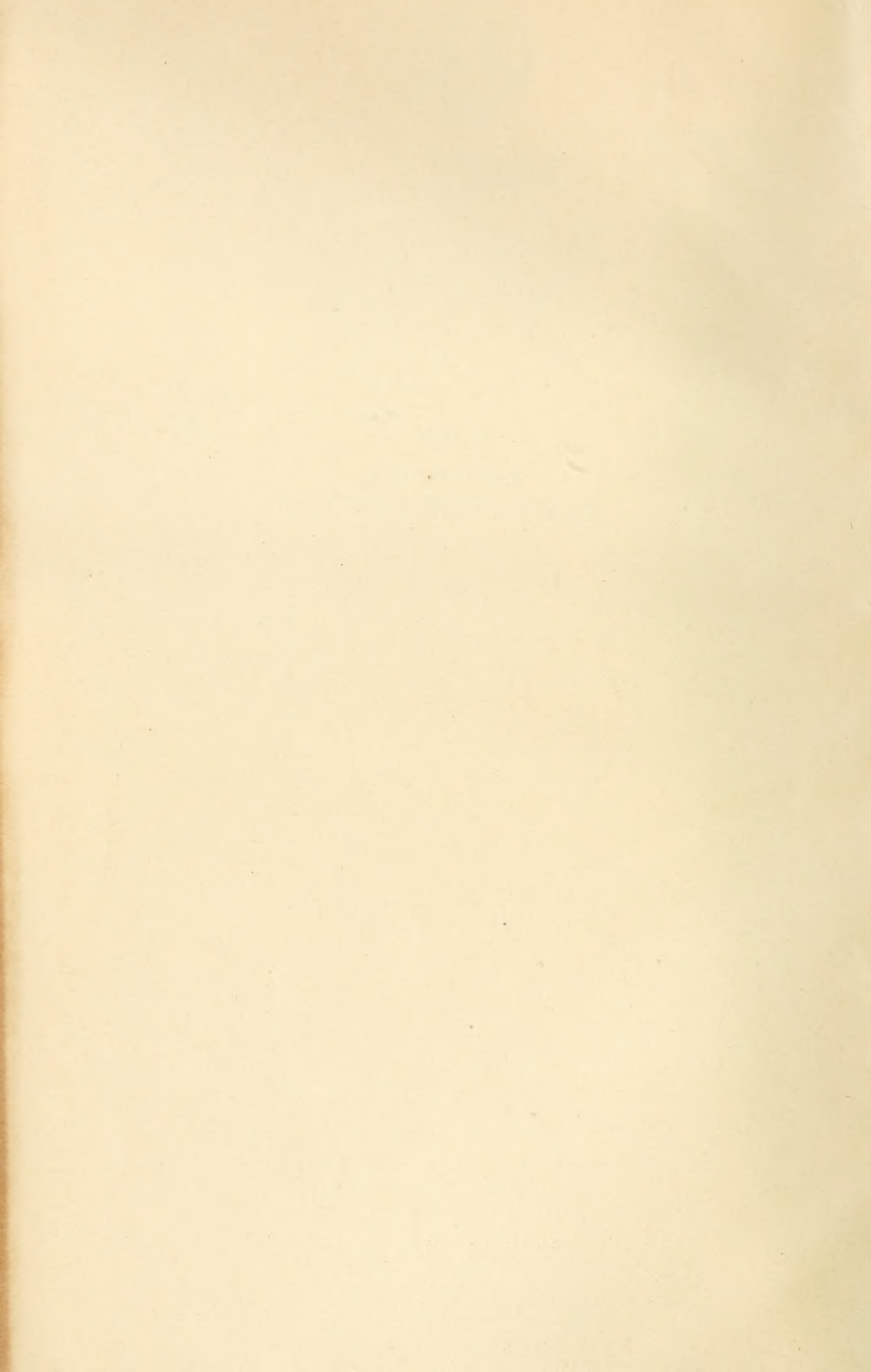


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INSTITUTES
OF
COMMON AND STATUTE LAW.

BY
JOHN B. MINOR, LL. D.,
PROFESSOR OF COMMON AND STATUTE LAW IN THE UNIVERSITY OF
VIRGINIA.

VOLUME I.
THE RIGHTS WHICH RELATE TO THE PERSON.



Fourth Edition, Revised and Corrected.

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TO HIS
FORMER AND PRESENT PUPILS,
THIS WORK
IS RESPECTFULLY AND AFFECTIONATELY INSCRIBED,
BY
THE AUTHOR.

PREFACE TO THE FIRST EDITION.

No one can be more surprised than the author at the bulk and character which this work has assumed. It was undertaken with the purpose of presenting in print what the author had been accustomed, for many years, annually to exhibit on the blackboard, that is, a mere tabular analysis of part of his course of instruction in the Law Department of the University, and was expected not to exceed, at most, five or six hundred pages. Insensibly, however, the explanations connected with the successive heads of the analysis became more and more comprehensive, until what was designed to be a *Synopsis* turned out a *Commentary*.

One consequence of this unanticipated enlargement of the author's plan is that the title which he at first gave of "*Synopsis of Common and Statute Law*," has become inapplicable, and he finds himself reluctantly constrained to adopt another designation, more pretentious, perhaps, than he might otherwise have chosen, namely, "*INSTITUTES OF COMMON AND STATUTE LAW*." No one who takes the trouble to bestow ever so cursory a survey on the first volume will doubt that it is sufficiently *elementary* to merit such a title, however he may question the "institutional method" observed, and object to the propriety and perspicuity of the arrangement in the minuter details.

The author's *immediate* object has been, not to address himself to the legal profession at large (whom, yet, he would like much to please and satisfy), but to prepare a text-book, to aid and supplement his own oral instructions; and many years' experience, as a teacher of law, assures him that he is not mistaken in respect to the signal efficiency of the *analytical arrangement* which, with that view, he has adopted. Whether that analytical method, thus prominently and systematically employed, will be, to a like extent, efficient with other teachers of the science of law, or with persons who pursue their studies privately, can only be determined by actual trial. The author is not sanguine that his legal brethren generally, if they condescend to look into his pages at all, will form a favorable opinion of the method in question, although he

conceives that, if they will take the pains to find and to follow the clue to the expositions presented, they will discover that the book affords no bad medium for a rapid survey of topics which there may be no opportunity to explore in more elaborate treatises.

The work having been printed in instalments, for the use of the author's pupils, as his health and leisure enabled him to condense into some congruity the materials which he had collected, traces of occasional want of homogeneity will be discerned: but, it is believed, in nothing more important than the references to the statutes of Virginia, which, down to page 192 of the first volume, and page 496 of the second, are to the Code of 1860 and the subsequent Sessions Acts, whilst afterwards they are to the Code of 1873 and the Sessions Acts following.

The limits of the work have permitted no reference to the statutes of States other than Virginia. Indeed, the author is of opinion that it is not desirable to ply the student of the elements with various and conflicting statutory provisions: and that it is essentially immaterial whether he learns the statute law of one State or another, provided he *learns it thoroughly*. When he has become perfectly master of the general statutes of any one State, a very short time,—a few weeks at farthest,—will suffice to acquaint him with the corresponding statutes of any other State, more discriminatingly than if his attention had been confined to the latter exclusively, a proposition to support which, if any should doubt it, the author might vouch a cloud of witnesses from the ranks of his own pupils, who, in every State in the South and West, have abundantly tested its truth.*

The reader who opens the volumes for the first time cannot fail to be struck, and perhaps will be repelled, by the very peculiar

* The author has been influenced to abstain for the most part from references to and comments on the law of other states, by the admonition suggested by Lord Stair in the Supplement to his Institutes (p. 852), and approved by the United States Supreme Court in *Townsend v. Tonnison*, 9 How. 415, that one should be cautious in citing the works of foreign jurists, since to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite. "It is magnificent," says he "to array authorities but somewhat humiliating to be detected in errors concerning them,—yet how can errors be avoided in such a case, when every day's experience warns us of the prodigious study necessary to the attainment of proficiency in our own law? My object in adverting to the mistake in the work referred to is, not to depreciate the author, for whom I entertain unfeigned respect, but to show that, since even so justly distinguished a lawyer fails when he travels beyond the limits of his own code, the attempt must be infinitely hazardous with others."

arrangement which, though familiar enough to those who, for the last thirty years, have pursued their legal studies at the University of Virginia, requires explanation. The arrangement is designed to exhibit *to the eye*, on the page, not only the carefully digested *order* of the propositions, but their *relative subordination* also, indicated by their standing more or less *to the right*. The most prominent propositions are designated by the Roman numerals I., II., III., etc., on the *extreme left* of the page; and then, as a guide to the reader, the intended position of the subordinate headings (designated by the Arabic numerals 1, 2, 3, etc.,) is shown by small letters attached to the figures (1^a, 1^b, 1^c, etc.). Thus, the subordinate heading *first* in importance and comprehensiveness is indicated by 1^a, and the subsequent topics corresponding to that (being placed as nearly under it as possible) are designated as 2^a, 3^a, etc. So the next in subordination is represented by 1^b, placed a little further to the right, and the subsequent corresponding heads (as nearly under 1^b as possible) by 2^b, 3^b, etc.

If the reader will turn to the table of contents, which is arranged upon this analytical method, he will have little difficulty in understanding and following the plan, which, indeed, is only novel in the extent to which it has been carried.

It is but too obvious that this arrangement leads to a great loss of space on the page; but the author speaks with the authority of a very long experience when he avers that it contributes vastly to clearness and accuracy of apprehension on the part of the student; and with more experience in book-making, or even with the opportunity of frequent personal conference with the printer, both of which advantages were denied to the author, much of the space lost might be saved.

The author's scheme, when he had in view only a skeleton analysis like Lord Hale's, as enlarged by Blackstone, was to follow in general the outlines of the latter writer's incomparable Commentaries. Had he meditated originally so voluminous a work as he has now partly completed, he would have ventured to deviate in many particulars from the analysis of Hale and Blackstone, as, indeed, in the detailed development of many subjects, especially such as presented themselves for discussion after his change of plan, he has actually done. Thus, to say nothing of other particulars, he would not have contented himself with the scanty synopsis he has offered of the English

government, but would have accompanied it with some parallel exposition of the institutions of our own country, a popular and comprehensive view of which he takes to be no inconsiderable *desideratum*.

The plan which he has marked out contemplates four volumes, (three besides the present), embracing the topics following:

Volume I. The Rights which Concern or *Relate to the Person*, with an introduction corresponding to that of Blackstone.

Volume II. The Rights which *Relate to Things Real*,—that is, land, and real property generally.

Volume III. The Rights which *Relate to Things Personal*; and

Volume IV. The *Remedies for Wrongs*, including an exposition of the general Practice of the Law, and the subject of Pleading.

The author hopes to have the second volume fully printed in a few months, and the two other volumes in the course of one or two years.

UNIVERSITY OF VIRGINIA. *March*, 1875.

PREFACE TO THE SECOND EDITION.

THE appearance of a second edition of the first two volumes of this work, after so brief an interval, might seem to indicate a degree of favor which the performance has not attained, nor, indeed, has had an opportunity to achieve; for, although not denied to those who sought for it, no attempt has been made to invite purchasers, nor has it, as yet, been *offered* to the general public at all. A reprint, however, having been made requisite by circumstances which need not be detailed, advantage has been taken of the occasion to revise the text, to make many corrections and some additions, and especially to put the whole in a more compact form, thereby lessening the bulk, and, in a still greater ratio, the price.

The work having been received with more approbation than the author had allowed himself to expect, a larger edition is now ventured upon, the merits of which are submitted to the candid judgment of the profession.

UNIVERSITY OF VIRGINIA, *September*, 1876.

PREFACE TO THE THIRD EDITION.

THE author has endeavored to make this third edition of Volumes I. and II. of the "INSTITUTES OF COMMON AND STATUTE LAW" somewhat more worthy of the acceptance vouchsafed to the work. His professional brethren of the bench as well as of the bar have hitherto been very indulgent to its defects, and very kind to its imputed merits; and whilst he acknowledges that he has no *right* to aught but *justice* at their hands, he will not pretend that he is not solicitous for their *favor*.

Some of the author's most trusted friends have advised against the retention in the *text* of the peculiar analytical arrangement, which constitutes so salient a feature of the book, and have insisted that at least the subdivisions should be reduced in number, and the analysis of each chapter or section should be placed at its beginning, and referred to in the text merely by its number. It is represented that the average reader is repelled by the unusual arrangement of the matter, from even *attempting* to explore it, and that the work is for that reason less sought after than otherwise it would be.

The author is but too sensible of the repellent effect of the arrangement he has adopted, and is agreeably surprised that it has not operated more decisively to prejudice the circulation of the book. To withstand the instances referred to, therefore, and to retain the original form, has demanded no ordinary strength of conviction. That conviction, however, has been supplied by the author's experience as a teacher of law for more than a third of a century. The result of that experience has assured him, beyond the chance, as he thinks, of error, that there comes to the patient student, from the analytical method in question, a clearness, a definiteness and accuracy of apprehension which it is worth while to purchase, though it be at the expense of occasional unfriendly animadversion, and the loss of attractiveness to the general reader.

PREFACE TO THE FOURTH EDITION.

This fourth edition of Volumes I. and II. of the "INSTITUTES OF COMMON AND STATUTE LAW," aims to have incorporated in it the provisions of the Virginia Code of 1887, taking effect the first day of May, 1888, together with numerous additional authorities, derived from the Reports of Virginia, of the United States, of the sister States and of England.

The work will thus be brought down to the present year, and its usefulness to Bench and Bar will, it is hoped, be thereby increased.

UNIVERSITY OF VIRGINIA, *October 5, 1891.*

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HISTORICAL SUMMARY

OF THE

MOST IMPORTANT EPOCHS IN THE LAW.

IN one of the best, as it is also one of the most interesting, chapters in his Commentaries, Sir William Blackstone, by way of supplement to his work, presents an historical review of the most remarkable changes that have happened in the law of England; thus marking out some outlines of juridical history, by taking a chronological survey of the state of those laws and their successive mutations. To this elegant summary the student's attention is invited the more earnestly, not only because of its intrinsic value, but because it first suggested, and constitutes the basis of that very admirable performance, "The History of the English Law, from the time of the Saxons to the accession of Elizabeth," by John Reeves, Esq., to which frequent reference is made in the following pages of this work. (1 Reeves' Hist. E. L., Preface, v.)

The several periods under which Blackstone considers the state of the legal polity of England are the six following, namely:

1. From the earliest times to the Norman Conquest (A. D. 1066).
2. From the Norman Conquest to the reign of Edward I., the English Justinian, as he is fondly styled (A. D. 1272).
3. From thence to the Reformation, *temp.* Henry VIII (A. D. 1509).
4. From the Reformation to the restoration of King Charles II. (A. D. 1660).
5. From thence to the Revolution under William, Prince of Orange (A. D. 1688); and
6. From the Revolution to the date of the Commentaries (A. D. 1765), somewhat more than a century ago. (4 Bl. Com. 407, & seq.)

Blackstone reserves this outline of juridical history for the final chapter of his great work; and it is not without considerable hesitation that a somewhat corresponding abstract is here exhibited at the very beginning of these Institutes; nor has such a departure from so illustrious an example been adventured upon save after a long experience, with successive classes of beginners, of its utility.

It is proposed, in the first section which follows, to do no more than present a tabular outline of the most note-worthy occurrences in the law of England, without any discussion thereof; and to follow that summary, in the second section, with a more detailed, but still a mere tabular exposition, chronologically, of the specially interesting incidents connected with the juridical history of our own, as well as of the mother country.

The student is expected to *learn the first section thoroughly*, and to make himself, by degrees, familiar with the outline of the second, to which it is hoped he will constantly refer during the perusal of the ensuing volumes.

SECTION i.

SUMMARY OF THE MOST PROMINENT EPOCHS IN THE LAW OF ENGLAND.

A. D.

890. 19 Alfred. The local customs of the *Heptarchy*, collected and digested by Alfred into one general Code, called *Dome-book* (Dom-boc), or *Liber Judicialis*; which was still extant in the reign of Edward IV. (A. D. 1461), but is now lost.
1041. 1 Edward *the Confessor*. *Re-compilation* of Alfred's Laws, which, in the lapse of a century and a half, had become greatly corrupted by local usages.
1066. 1 William I. *Norman Conquest*; followed (about A. D. 1086) by the introduction into England of the *Feudal law*, in its utmost rigor, by consent, too, of the *Wittenagemote*, *Commune Concilium*, or Parliament; thereby attaching to lands, amongst several other very oppressive incidents, an *absolute inalienability*, without the consent of the lord.
1138. 3 Stephen. Introduction into England, by the Ecclesiastics, of the *Roman Imperial Law*, to the study of which the discovery of a copy of Justinian's Pandects, at Amalfi, in Italy, about eight years before, after they had been virtually lost to the world for near five centuries, had given a powerful impulse.
1215. 16 John. *Magna Charta* ratified by John, upon the demand of his Barons, at *Runnimede*, on the Thames, some miles

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above London. It sets forth, with marvellous perspicacity, the essential principles of rational liberty: and is the treasure house whence the modern American constitutions have derived many of their valuable elements.

1285. 13 Edward I. Statute *de donis conditionalibus* enacted, giving rise to *Estates-tail*; whereby lands were designed, by the Nobles who enacted the law, to be settled upon families *inalienably*, as long as any of the blood in the direct line of descent subsisted (13 Ed. I., c. 1).
1290. 18 Edward I. Statute of *Quia emptores terrarum*, whereby feudal tenants were allowed to alienate lands in fee-simple, *without consent of the lord* (18 Ed. I., c. 1).
1295. 23 Edward I. Real epoch of the *House of Commons*, the early germ of which appears in 49 Hen. III. (A. D. 1263).
1370. 43 Edward III. The doctrine of *Uses and Trusts* introduced by the Ecclesiastics, in order to evade the Statutes of *Mortmain*, which forbade Corporations, and especially religious Corporations (Monasteries, &c.), from acquiring lands without license from the Crown.
1473. 12 Edward IV. *Taltarum's Case*, which determined that *Estates-tail* were *barrable* (*i. e.*, conveyable) by the device of a *Common Recovery* (which is merely a judgment collusively recovered by the intended grantee of the land): thus defeating, after an interval of nearly two hundred years, the skilfully devised, but mischievous policy, of the great *Statute of Entails* (13 Edw. I., c. 1).
1536. 27 Henry VIII. *Statute of Uses*; whereby *Uses*, which before were only *equitable interests*, were intended to be converted into *legal estates*; the design being to *abolish uses, or equitable estates, altogether*, although, by the construction of the courts, it fell very far short of that effect (27 Hen. VIII., c. 10).
1541. 32 Henry VIII. *Statute of Wills*; which allowed *lands* to be transferred from one to another, by the *last will of the owner* (32 Hen. VIII., c. 1, supplemented by 34 Hen. VIII., c. 5).
1628. 3 Charles I. *Petition of Right*; setting forth, as solemnly acknowledged by the Crown, the fundamental doctrines of English liberty (3 Car. I., c. 1).
1660. 12 Charles II. Statute abolishing *Tenure in Chivalry*, with its oppressive incidents, and all *oppressive* feudal tenures, retaining only *tenure in Socage*, and three others.
1678. 29 Charles II. Statute to prevent *Frauds and Perjuries*; by requiring certain transactions to be *in writing*, and in some instances solemnly authenticated besides, embracing especially provisions touching—
1. Conveyances of land.
 2. Contracts for the sale or lease of lands, and some other Contracts.
 3. Wills, particularly of *lands* (29 Car. II., c. 3, §§ 1 to 5).
1680. 31 Charles II. *Habeas Corpus Act*; whereby provision was made for a prompt judicial inquiry into the legality of

A. D.

every imprisonment alleged to be without sufficient lawful warrant.

1688. 1 William and Mary. *Great Revolution*, accomplished by the agency of William, Prince of Orange; whereby James II. was virtually expelled for mis-government, and his daughter Mary, the wife of the Prince of Orange, together with her husband, were invited *by the two houses of parliament*, to occupy the vacant throne, upon conditions consonant with the ancient liberties of England, as set forth anew in the declaration known as the *Bill of Rights* (1 Wm. & M., St. 2, c. 2): thus ascertaining the title to the crown of Great Britain to be undeniably a *parliamentary title*, and not a title *jure divino*.
1695. 7 William III. Statute allowing Counsel to persons *indicted for treason* (7 Wm. III., c. 3).
1700. 12 & 13 William III. *Act of Settlement*; settling the crown of Great Britain, upon failure of the issue of the Princess Anne, Mary's sister, upon the Princess Sophia of Brunswick, and the heirs of her body, *being Protestants* (12 & 13 Wm. III., c. 2).
1701. 12 & 13 William III. Statute (part of the Act of Settlement) changing the tenure of office of the Judges of England, from *during the King's pleasure*, to *during good behaviour*; the commission, however, being still liable to be vacated by the *demise of the Crown* (12 & 13 Wm. III., c. 2).
1714. 1 George I. Statute prolonging the *duration of the parliament* from three to *seven years!* (1 Geo. I., c. 38).
1747. 20 George II. Statute allowing Counsel in *Parliamentary impeachments* for treason (20 Geo. II., c. 30).
1752. 24 George II. Statute introducing the "*change of style*," by correcting the Julian Calendar, after the example of Pope Gregory XIII., in 1582 (24 Geo. II., c. 23).
1760. 1 George III. Statute making the tenure of office of Judges to continue *during good behaviour*, notwithstanding the *demise of the Crown* (20 Geo. III., c. 23).
1800. 39 & 40 George III. *Legislative Union* of Great Britain and Ireland (39 & 40 Geo. III., c. 77).
1832. 2 William IV. Statute *reforming the representation* in Parliament (2 Wm. IV., c. 45).
1834. 4 William IV. Statute introducing important reforms of the practice of *Pleading* (3 & 4 Wm. IV., c. 42).
1834. 4 William IV. Statute modifying the *common law canons of Descent*. (3 & 4 Wm. IV., c. 106.)
1837. 7 William IV. Statute allowing Counsel in *all Criminal Proceedings*. (6 & 7 Wm. IV., c. 114.)
1845. 8 Victoria. Statute declaring all lands, as to the immediate freehold thereof, to *lie in grant as well as in livery*. (8 & 9 Vict. c. 106.)

SECTION II.

DATA TOUCHING THE CHRONOLOGY OF ENGLISH AND
AMERICAN LAW.

A. C.

55. Romans landed in Britain, under Julius Cesar.

A. D.

186. Christianity introduced into Britain, at the request of
Lucius, King of the Britons, under the auspices
of Pope Eleutherius (Bede, Ecc. Hist. B. I., c.
4; 1 Rapin Hist. Eng. 28 (B. I.).)408. Romans finally abandoned Britain, *temp.* Emperor
Honorius.449. Saxons invited over by Britons, in order to assist in re-
pelling the Picts and Scots.597. Augustine sent by Pope Gregory the Great into Eng-
land, to propagate Christianity.600. Saxon *Heptarchy* established.827. Kingdoms of *Heptarchy* united under *Egbert*, into one
kingdom.

832. First invasion of the Danes.

871. *Alfred the Great*.890. 19 *Alfred*. Local customs of the *Heptarchy* col-
lected and digested by Alfred into one general
Code, called *Dome book* (Dom-boc), or *Liber*
Judicialis; extant in the reign of Edward IV.
(A. D. 1461), but now lost (1 Bl. Com. 64-'5;
1 Reeves' Hist. Eng. Law, 25-'6.)

901. Edward the Elder.

925. Athelstan.

941. Edmund.

946. Edred.

955. Edwy.

" Edgar.

975. Edward the Martyr.

978. Ethelred.

1013. The Danes, under Sweyn, enter London, whence
Ethelred, at their approach, fled to Normandy;
and Sweyn is proclaimed King.1013. Sweyn, *First Danish King*.

1014. Ethelred restored.

1016. Edmund Ironside.

1016. *Kingdom divided by Convention*, between Ed-
mund and Canute, son of Sweyn.1017. Canute succeeds to the whole, on Edmund's Death.
Second Danish King.1035. Harold Harefoot. *Third Danish King*.1039. Hardi Canute, or Canute II. *Fourth Danish King*.1041. Edward the Confessor. *Last Saxon King* of the
Royal race.1041. 1 Edw. the Confessor. *Re-compilation* of Al-

fred's laws, which had been greatly corrupted by local usages during the one hundred and fifty years which had elapsed since they were first collected. Hence, as Alfred is the *Conditor*, so Edward is styled *Restitutor legum Anglicanarum*. (1 Bl. Com. 66; 1 Reeves' Hist. Eng. Law, 25-'6; 1 Rap. Hist. Eng., 147 & seq.; Dissert. Gov. of Ang. Sax; 2 Turn's Ang. Sax. Hist. 131 & seq.)

1066. Harold, January 5. In violation of the law of succession.

Norman
Dynasty.

1066. William I., October 14. *First Norman King*. Succeeded by *the Conquest* of the Country.

1086. 20 Wm. I. Feudal law introduced in its utmost rigor by consent of the *Commune Concilium*, *Wittena gemote*, or Parliament. (1 Reeves' Hist. Eng. Law, 34 to 36; Hale's Hist. Com. Law, 133 to 135, & n. (K); Sax. Chron. A. D. 1086; 1 Hume's Eng. App'x II.)

1086. 20 Wm. I. *Dooms-day Book* completed. A *census* of lands, tenures and tenants for the whole realm; a master-piece of state-craft. (1 Reeves' Hist. Eng. Law, 219; Hale's Hist. Com. Law, 137 & seq., n's (a) and (M); Roger of Hov. Chron. A. D. 1086; Hal. Mid. Ages, c. VIII.)

1087. William Rufus. September 26.

1100. Henry I. August 5.

During this reign, by a statute or assize, not extant, the first limitation was imposed on any action *for lands*—namely, that no writ of Right should be brought on any title accruing *before* 1 Hen. I. (2 Min. Insts. 567.)

Blois
Dynasty.

1135. Stephen. December 26.

1138. 3 Steph. Roman Imperial (or Civil) Law introduced into England by the Ecclesiastics. (1 Bl. Com. 18; 1 Min. Insts. 12, 13; 1 Reeves' Hist. Eng. Law, 68.)

Plantagenet
Dynasty.

1154. Henry II. December 19.

1164. 10 Henry II. Constitutions of Clarendon, defining and limiting the immunities of the clergy, and the ecclesiastical jurisdiction. (Hale's Hist. Com. Law, 164 & n. (B); Mat. Par. Chron. A. D. 1164.)

1187. 33 Henry II. Glanvil, "Treatise on the Laws and Customs of England."

1189. Richard I., *Cœur de Lion*. September 23.

1194. 5 Rich. I. "Laws of Oleron," compiled under Richard's direction, at the Isle of Oleron, off the coast of France, near the mouth of the Garonne, upon his return from Palestine. (1 Reeves' Hist. Eng. Law, 212; Hale's Hist. Com. Law, 105, & n. (D).)

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1199. John. May 27.

Plantagenet
Dynasty.

1215. 17 John. *Magna Charta* assented to by John, at Runnymede on the Thames, a few miles west of London. (1 Rap. Eng. 285; B. VIII; 1 Reeves' Hist. Eng. Law, 209, 231; Hal. Mid. Ages, c. VIII.)

1216. Henry III. October 28.

1225. 9 Henry III., c. 1 & seq. *Magna Charta* confirmed. First English Statute extant. The Great Charter was confirmed, with occasional variations, comparatively immaterial, above thirty times. (1 Th. Co. Lit. 22; 2 Reeves' Hist. Eng. Law, 84-5.)

1225. 9 Henry III., c. 36. *First Statute of Mortmain*. (2 Bl. Com. 270; 1 Reeves' Hist. Eng. Law, 209, 231; 2 Min. Insts. 590 & seq.)

1236. 20 Henry III., c. 8. Limitation to Writ of Right, where title accrued before Henry II. (2 Min. Insts. 569.)

" 20 Henry III., c. 1. Damages to Dowresses when husband *dies seised*. (2 Min. Insts. 161.)

1263. 47 Henry III. Bracton. "Treatise of the Laws and Customs of England." (Hale's Hist. Com. Law, 289, 290; 2 Reeves' Hist. Eng. Law, 86 & seq.; 4 Id. 570-71, & n. t.)

1265. 49 Henry III. House of Commons originated, or at least its *germ* *recognized*. (Bac. Abr. Court of Parliament, (A.): 1 Hume's Eng. 432.)

1268. 52 Henry III. Statute of Marlebridge, punishing Waste in all tenants for life or years. (2 Min. Insts. 621 & seq.)

1272. Edward I. November 20.

1272. 1 Edward I. Beginning of the Year-books, or annually published Reports of the Cases adjudged by the principal Courts of England, taken and published by public authority. They were continued from 1 Edw. I. to the end of the reign of Edw. III. (A. D. 1377); intermitted for twenty-two years, through the reign of Rich. II.; resumed again about 1 Hen. IV. (A. D. 1399); and kept up, but not with absolute regularity, until 27 Hen. VIII. (A. D. 1536.) (2 Reeves' Hist., Eng. Law, 357.)

1278. 6 Edward I., c. 5. Statute of Gloucester, punishing Waste with treble damages, and forfeiture of the *thing* (place) wasted. (2 Min. Insts. 622.)

" 6 Edward I., c. 3. Statute of Gloucester, limiting the effect of collateral warranty by tenant by the Curtesy, in barring the claim of

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- the wife's heir, to the heritage descended
from the father. (2 Min. Insts. 719 & seq.)
1279. 7 Edward I. Statute 2. *Second Statute of Mortmain.*
1280. 8 Edward I. Introduction by Ecclesiastics, of
Common Recoveries, to evade the Statutes of
Mortmain, by a seeming but collusive recovery
of the lands *by suit.* (2 Bl. Com. 271; 2
Min. Insts. 592.)
1285. 13 Edward I. Fleta. "Commentaries upon the
English Law." Supplemental to Bracton. (2
Reeves' Hist. Eng. Law, 279.)
- " 13 Edward I., c. 1. Statute Westm. II., "*De
Donis Conditionalibus*," creating Estates
Tail. (2 Reeves' Hist. Eng. Law, 164; 2 Min.
Insts. 89.)
- " 13 Edward I., c. 18. Statute Westm. II., of
Elegit giving creditors an execution (after-
wards called *Elegit*) against a moiety of debt-
or's *freehold lands.* (2 Min. Insts. 302, &c.)
- " 13 Edward I., Stat. 3, c. 1. Statute Westm. II.,
"*De Mercatoribus*," permitting a security for
money, called a recognizance of *Statute Mer-
chant*, to be charged *on all the lands* of the
debtor. (2 Bl. Com. 160; 2 Min. Insts. 326.)
- " 13 Edward I., c. 32. *Third Statutes of Mort-
main*, subjecting to forfeiture, lands sought
to be transferred to Ecclesiastical persons by
collusive common recovery. (2 Min. Insts.
592.)
- " 13 Edward I., c. 45. Limitation to Writ of Right
when title accrued before 1 Rich. I.
1289. 17 Edward I. Britton. *A Compendium* of Brac-
ton, presenting a more distinct view (in Nor-
man French) of the doctrines of the law. (2
Reeves' Hist. Eng. Law, 280.)
1290. 18 Edward I., c. 1. Statute Westm. III., *Quia
emptores terrarum*, permitting the feudal ten-
ants of *subjects* (not of the Crown) to aliene
their lands in *fee simple*, without consent of
the lord; the lands, however, *to be held, not of
the grantor, but of the chief lord of the fee.*
(2 Reeves' Hist. Eng. Law, 223; 2 Min. Insts.
641.)
1295. 23 Edward I. Real Epoch of the House of Com-
mons. (1 Hume's Eng. 470.)
1307. Edward II. July 8.
1322. 15 Edward II. Statute recognizing the House
of Commons. (1 Hal. Const. History, 3.)
1326. Edward III. January 25.
1326. 1 Edward III., c. 12 Statute permitting tenants
in capite (*i. e.*, of the King) to aliene their

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- lands, subject to a reasonable *fine* to the King for his consent. (3 Th. Co. Lit. 211 '12, n. (A).)
1330. 4 Edward III., c. 14. Statute providing for *annual parliaments*. (2 Hal. Const. H. 72.)
1351. 23 Edward III., c. 2. Statute *defining treason* and abolishing the doctrine of *constructive treasons*. (4 Bl. Com. 67; Synops. Crim. Law, 26 '7.)
- " 27 Edward III., c. 9. Authorizing security for money, called a recognizance of *Statute Staple* chargeable on *all the lands* of the debtor. (2 Bl. Com. 160; 2 Min. Insts. 326.)
1363. 36 Edward III., c. 15. Statute enacting that law proceedings should be *conducted in the English tongue*, but be *entered and enrolled in Latin*. Previously the proceedings had been both conducted and enrolled in Norman French, in which language the law treatises and reports continued to be written for more than three hundred years afterwards. (3 Bl. Com. 318 & seq.)
1370. 43 Edward III. The doctrine of *Uses and Trusts* introduced into the English law by the Ecclesiastics, in order to evade the statutes of *Mortmain*, and soon universally employed by the people, in order to obviate feudal oppressions and inconveniences. (2 Bl. Com. 328; 2 Min. Insts. 204, &c., 594.)
1377. 50 Edward III., c. 6. Statute recognizing the *existence of Uses*. (2 Bl. Com. 328; 2 Min. Insts. 204-'5.)
1377. Richard II. June 22.
1380. 3 Ric. II. Wycliff's Translation of the Bible.
1392. 15 Richard II., c. 5. *Fourth Statute of Mortmain*, subjecting Uses and Trusts to the *Mortmain* policy. (2 Bl. Com. 329; 2 Min. Insts. 204, &c., 594.)
1399. Henry IV. September 30. Lancaster-Plantagenet Dynasty.
1413. Henry V. March 21.
1422. Henry VI. September 1.
1436. Printing with movable types, at Strasburg, by Gutenberg.
1461. Edward IV. March 4. York-Plantagenet Dynasty.
1461. 1 Edward IV. Statute confirming all judicial acts and private business transactions occurring in the "Time or Times of Henry IV., Henry V., his son, and Henry VI., his son, late *in Deed, and not in Right*, successively Kings of England." (2 Eng. Stats. at Large, 586.)
1473. 12 Edward IV. *Taltarum's Case*, which deter-

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York-Plantagenet
Dynasty.

mined Estates-tail to be *barrable* (that is, conveyable) by *Common Recovery*. (2 Bl. Com. 117; 2 Min. Insts. 93.)

1474. 13 Edward IV. Printing with movable types introduced into England, by Caxton.

1475. 14 Edward IV. Littleton's *Tenures composed*, but not *printed* until about 1481. (Lit. Ten. Pref. ix.; 1 Hargr. Co. Lit., Pref. v., xxii.; 4 Reeves' Hist. Eng. Law, 113 & seq.)

1483. Edward V. April 9.

1483. Richard III. June 26.

1483. 1 Richard III., c. 5. Statute vesting lands, where the King, when Duke of Gloucester, had been feoffee to Uses, in the *Cestui que Use*. (1 Bl. Com. 332; 2 Min. Insts. 207.)

Lancaster-Plantagenet
and Tudor
Dynasties.

1485. Henry VII. August 22.

1496. 11 Henry VII., c. 20. Statute limiting the effect of Collateral Warranty by *tenant in Dower*, in barring the husband's heir to the *heritage descended* from the dowress. (2 Bl. Com. 303; 2 Min. Insts. 717.)

1499. 14 Henry VII. *Executive Firms* allowed to recover a *term for years*, as well as *Damages*.

1504. 19 Henry VII., c. 15. Subjecting *Uses to execution for debts*, like legal estates. (2 Bl. Com. 332; 4 Reeves' Hist. Eng. Law, 139.)

1509. Henry VIII. April 22.

1532. 23 Henry VIII. Reformation begun in England. (4 Reeves' Hist. Eng. Law, 205, 437, 443; 1 Rap. Eng. 794, B. xv.; Burnet's Hist. Reform'n: 5 D'Aubigné's Hist. Reform'n.)

1534. 25 Henry VIII. Tyndale's Translation of the Bible.

1537. 27 Henry VIII., c. 10. *Statute of Uses*, converting *Uses* into *legal estates*, and designed to *abolish Uses* altogether, although in that it failed of effect. (2 Bl. Com. 333; 2 Min. Insts. 207 & seq., 813 & seq.)

1539. 30 Henry VIII. Cranmer's Translation of the Bible.

1541. 32 Henry VIII., c. 1. Statute of *Wills*, allowing lands to be disposed of *by will*, provided it were *in writing*. Supplemented by Stat. 34 Hen. VIII., c. 5. (2 Bl. Com. 375.)

" 32 Henry VIII., c. 2. Limitation to Writ of Right, where title accrued 60 years before.

" 32 Henry VIII., c. 24. Statute dissolving monasteries.

1547. Edward VI. January 28.

1552. 5 & 6 Edward VI., c. 16. Statute touching the sale of offices. (2 Bl. Com. 36-7, & n. (31); 2 Min. Insts. 32; Bac. Abr. Offices (F.).)

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1553. Mary. July 6.

1557. 4 & 5 Ph. & Mary, c. 8. Statute touching the custody, and by construction the guardianship, of female infants under sixteen, *in respect of marriage*. (1 Bl. Com. 461; 1 Min. Insts. 458.)

" 4 & 5 Ph. & Mary. Geneva Translation of the Bible.

1558. Elizabeth. November 17.

1571. 13 Elizabeth, c. 5. Statute making voidable fraudulent conveyances of *lands and chattels*, in respect to *creditors*. (2 Bl. Com. 296; 2 Min. Insts. 679 & seq.)

1585. 27 Elizabeth, c. 4. Statute making voidable fraudulent conveyances of *lands*, in respect to *purchasers*. (2 Bl. Com. 296; 2 Min. Insts. 679 & seq., 700 & seq.)

1601. 43 Elizabeth, c. 4. Statute declaratory chiefly of the common law, touching and giving effect to *vague and indefinite charities*. (2 Bl. Com. 376; 2 Min. Insts. 254, 662; Vidal v. Girard's Ex'ors, 2 How. 194 & seq.)

1603. James I. March 24.

1606. 4 Jac. I. First Charter of Virginia to Sir Thomas Gates and others, April 10, 1606. (1 Hen. Stats. at Large, 57 & seq.)

1611. 8 Jac. I. First institution of *private property* in Virginia. (2 Min. Insts. 2, 3.)

" 8 Jac. I. Authorized Version of the Bible at present in use.

1619. 16 Jac. I. First Assembly held in Virginia, it was long believed without regular authority (1 Hen. Stats. 121, n.*; Stith's Virginia, 160); but explorations in the British State Paper Office now show the contrary. (Colon'l Records of Virginia, Introd. Note, vii.)

1620. 17 Jac. I. Slaves first introduced into Virginia by a Dutch man-of-war. (Bev. Hist. Va. 51; 1 Burk's Va. 211; 1 Min. Insts. 182-'3 & seq.)

1621. 18 Jac. I. Coke's first Institutes completed.

1623. 20 Jac. I. First Assembly held in Virginia whose proceedings were retained in the colonial archives. (1 Hen. Stats. 121.)

1624. 21 Jac. I., c. 16. First *general* Statute of Limitations in England. (3 Bl. Com. 188 & seq.; Id. 306 & seq.; 2 Min. Insts. ch. xvii.)

" 21 Jac. I. Charter of Virginia cancelled upon writ of *quo warranto* in King's Bench, thus converting the *Charter* into a *Provincial* or *Royal* government, because it was supposed to be a nursery of *democracy*. (1 Burk's Va. 294; Campb. Va. 173-4; 1 Min. Insts. 54.)

1625. Charles I. March 27.

Transcripts
Photostated
and other
documents

Stuart
Dynasty.

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- Stuart
Dynasty.
1628. 3 Car. I., c. 1. The famous statute known as "*The Petition of Right*," setting forth very emphatically some of the most important rights of the people of England, to which the king yielded a reluctant consent. It may be considered as the first setting the battle in array between liberty and prerogative. (1 Bl. Com. 128; 1 Min. Insts. 77; 4 Do. 408 & seq.; 1 Hal. Const. Hist. Eng. 286, 288.)
1628. 3 Car. I. Sir Edward Coke's Commentary on Littleton's Tenures (1 Institute), *printed*. (1 Hargr. Co. Lit. Pref. xxiii. (to 13th edition).)
1640. 16 Car. I., c. 1. Statute providing for and *securing triennial parliaments*. (2 Hal. Const. Hist. Eng. 72-'3.)
- " 16 Car. I., c. 10. Proceeding for the Writ of *Habeas Corpus*.
1649. 23 Car. I. Charles I. *beheaded*, January 30.
- Common-
wealth.
1649. Commonwealth. January 30.
1649. 1 Commonwealth. Act of the General Assembly of Virginia, declaring the indignation of the colony at the decapitation of Charles I.; and avowing loyalty to his son, Charles II. (1 Hen. Stats. 359.)
1651. 2 Commonwealth. Capitulation and surrender of the colony of Virginia to the commissioners of the Commonwealth of England. (1 Hen. 363, 365; 2 Burk's Va. 85 & seq.; Camp. Va. 217 & seq.)
- Cromwell
Dynasty.
1654. Cromwell (Oliver). January 9.
1658. Cromwell (Richard). September 13.
- Stuart
Dynasty.
1660. Charles II. May 29.
~~1660.~~ Considered as succeeding his father, January 30, 1649, and the regnal years reckoned accordingly.
1660. 12 Car. II., c. 24. Statute abolishing Tenure in Chivalry, with its oppressive incidents, and all *oppressive* feudal tenures, retaining only tenure *in Socage*, and three others. (2 Bl. Com. 77.)
1664. 16 Car. II., c. 1. Statute repealing act for *triennial* parliaments. (2 Hal. Const. Hist. Eng. 244-'5.)
1678. 29 Car. II., c. 3. Statute to prevent *Frauds and Perjuries*, by requiring certain transactions to be *in writing*, and in some instances solemnly authenticated besides; embracing especially provisions touching—
1. *Conveyances* of land;
 2. *Contracts* for the sale or lease of lands, and some other contracts (2 Min. Insts. 665, 855);

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3. *Wills*, especially of lands.

1680. 31 Car. II., c. 2. Statutes securing to the subject the benefit of the writ of *Habeas Corpus*, the statute being known as the "*Habeas Corpus Act*." (2 Bl. Com. 135 & seq.; Bac. Abr. Habeas Corpus, (B.); 4 Min. Inst. 412 & seq.)

1685. James II. February 6.

1689. William and Mary. February 13.

1689. 1 William and Mary. *Great Revolution*, accomplished by the agency of William, Prince of Orange; whereby James II. was virtually expelled, for misgovernment, and his daughter Mary, the wife of the Prince of Orange, together with her husband, were invited, *by the two houses of Parliament*, to occupy the vacant throne, upon *express* conditions, consonant with the ancient liberties of England, as set forth anew in the declaration known as the *Bill of Rights*. (1 Wm. & M., St. 2, c. 2; 3 Hal. Const. Hist. Eng. 62 & seq.)

1692. 3 & 4 William & Mary, c. 14. Statute of *Fraudulent devises*, making devisees of lands liable for decedent's debts, nearly as heirs are. (2 Bl. Com. 378.)

1694. 6 William and Mary, c. 2. Statute establishing *triennial parliaments*. (1 Bl. Com. 189.)

1694. William III. December 28.

The regnal years are reckoned from the accession of William and Mary, in 1689.

1695. 7 William III., c. 3. Statute allowing counsel to persons *indicted* for treason. (4 Bl. Com. 356; Synops. Crim. Law, 245.)

1696. 8 & 9 William III., c. 11. Statute allowing several breaches of the condition to be assigned in actions on bonds with *collateral condition*, and judgment for the penalty, as at common law, but to be discharged by the damages assessed by a jury for the breaches. (Bac. Abr. Obligation, (F.); 4 Min. Inst. 25, 786.)

1700. 12 & 13 William III., c. 2. Statute known as the "*Act of Settlement*," settling the crown of Great Britain, upon the failure of the issue of the Princess Anne, Mary's sister (Mary herself being now dead without issue), upon the Princess Sophia, of Brunswick, and the heirs of her body, *being Protestants*, with some new provisions for better securing the religion, laws, and liberties, which the statute declares to be "the birthright of the people of England." (1 Bl. Com. 128; 3 Hal. Const. Hist. Eng. 134 & seq.)

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Orange
Dynasty.

1700. 12 & 13 William III., c. 2. Statute (a portion of the Act of Settlement) changing the tenure of office of judges from *during the King's pleasure*, to *during good behavior*; but still leaving their commissions liable to be vacated by the *demise of the Crown*. (1 Bl. Com. 267-'8; 3 Hal. Const. Hist. Eng. 135, 142-'3.)

Stuart
Dynasty.

1702. Anne. March 8.

1705. 3 & 4 Anne, c. 9. Statute making promissory notes, payable *unconditionally*, to *order*, or to *bearer*, and for a *sum certain*, assignable *like bills of exchange*. (2 Bl. Com. 467.)

" 3 & 4 Anne. Statute in Virginia making estates-tail inalienable, *except by act of assembly*. (3 Hen. Stats. 320.)

1706. 4 & 5 Anne, c. 16, § 21. Statute declaring all *collateral warranties* by any ancestor, who has no estate of inheritance in possession, to be *void against his heir*. (2 Min. Insts. 720; 2 Bl. Com. 303.)

1706. 4 & 5 Anne, c. 16, §§ 12, 13. Statute directing judgment *on money bonds in a penalty*, to be entered for the penalty, but to be discharged by payment of the principal sum, with interest. (3 Bl. Com. 435; 4 Min. Insts. 19, 25, 786.)

" 4 & 5 Anne, c. 16, §§ 4, 5. Statute allowing defendant to an action to plead as many pleas as *may be necessary*. (3 Bl. Com. 308; 4 Min. Insts. 614-'15, 948-'9.)

1707. 5 Anne, c. 8. Statute consummating the Union with Scotland. (1 Bl. Com. 95.)

Brunswick
Dynasty.

1714. George I. August 1.

1714. 1 George I., c. 38. Statute making the existing Parliament (elected under the *triennial* Act) to last for *seven years!* Providing also in general for *Septennial* Parliaments. (1 Bl. Com. 189; 3 Hal. Const. Hist. Eng. 171 & seq.)

1727. George II. June 11.

1734. 7 George II. Statute in Virginia making estates-tail alienable *by deed simply*, without an act of Assembly, provided they were ascertained by *judicial inquiry*, to be of less value than £200 sterling, &c. (4 Hen. Stats. 400.)

1747. 20 George II., c. 30. Statute allowing counsel in *Parliamentary impeachments* for treason. (4 Bl. Com. 356; Synops. Crim. Law, 245.)

1752. 24 George II., c. 23. Statute changing "the style," and correcting the *Julian* Calendar, after the manner of Pope Gregory XIII., in 1582. (2 Min. Insts. 188.)

1760. George III. October 25.

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1760. 1 George III., c. 23. Statute making tenure of ^{Benjamin Franklin} office of Judges to be *during good behavior*, and to continue notwithstanding the *demise of the Crown*. (1 Bl. Com. 268.)
1765. 5 George III., c. . . Statute imposing stamp-duties on American Colonies.
1766. 6 George III., c. 12. Statute repealing the stamp-duties, but *reserving the power to tax*. (1 Bl. Com. 109.)
1767. 7 George III., c. . . Statute attempting the *internal taxation* of the colonies, by duties on *glass, paper, tea, &c.*
1770. 10 George III., c. . . Statute abolishing the duties on the American colonies, *except on tea*.
1773. 13 George III. Destruction of cargoes of tea belonging to the East India Company, in the harbor of Boston.
1774. 14 George III. Assembling of the first Continental Congress at Philadelphia, September 5.
1776. 16 George III. June 29. Declaration of Independence *by Virginia*.
- “ 16 George III. *July 4*. Declaration of the independence *of the Colonies by Congress*.
- “ October 7. Estates-tail in Virginia, converted by act of Assembly into estates in fee simple. (9 Hen. Stats. 226; V. C. 1873. ch. 112, § 9; V. C. '87. ch. 107. § 2421; 2 Min. Insts. 95 '6.)
- “ October. Commission, consisting of Thomas Jefferson and others, to revise the laws of Virginia. (2 Min. Insts. 537.)
1778. Slave trade abolished by Virginia, near *thirty years before any other government in the world*. (9 Hen. Stats. 471.)
1779. June 18. Committee on revisal of laws reported, but report not fully acted on until 1785. (2 Min. Insts. 540.)
1781. March 1. Articles of Confederation ratified by Maryland, the last of the States to assent to them.
- “ May. Pelatiah Webster's pamphlet urging the insufficiency of existing articles of Confederation
- “ October 19. Capitulation of Cornwallis at Yorktown, in Virginia, virtually ending the war.
1783. September 3. Independence of United States acknowledged by Great Britain, and treaty of peace and of boundary negotiated at Paris.
1784. A conviction becoming general that a revisal of the Articles of Confederation was indispensable, and the formation of a *Government*, instead of a *Confederation*.
1786. January 21. A convention recommended by Vir-

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- ginia to take into consideration the trade of the United States, and the commercial regulations necessary for the common interest. (5 Ell. Debs. 113 & seq.)
1786. September 11. Assembly of convention of delegates from Virginia, Delaware, Pennsylvania, New Jersey, and New York, at Annapolis, Md. It confined itself to recommending a convention of delegates from all the States, to meet at Philadelphia, in May, 1787, "to devise such further provisions as shall appear to them to be necessary to render the constitution of the Federal Government *adequate to the exigencies of the Union*." (5 Ell. Debs. 115-16.)
- " November 23. Virginia complies with the recommendation, and appoints delegates, the other States following the example, except Rhode Island, which never sent any.
1787. January 1. Statute in Virginia takes effect (enacted October, 1785), *abolishing* the common law of Descents, and substituting a wholly new system. (12 Hen. Stats. 138; 2 Min. Insts. 540.)
- " January 1. Statute in Virginia takes effect, dispensing with "*heirs*," or any other specific word of inheritance, in order to create an estate of inheritance. (2 Min. Insts. 86; V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420.)
- " May 14. Day appointed for the assembling, in Philadelphia, of the convention to "devise such further provisions as shall appear to be necessary to render the Constitution of the Federal Government *adequate to the exigencies of the Union*." But *seven* States (a majority of the thirteen) were not assembled until May 25.
1787. May 25. Convention was organized by electing General George Washington president, delegates being present from Massachusetts, New York, New Jersey, Delaware, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia. Delegates appeared from Connecticut and Maryland May 28, and from New Hampshire July 23. None were ever present from Rhode Island.
- " September 17. Convention completed the work of the Federal Constitution, and reported the same to the Congress of the Confederation.
- " September 28. Congress of Confederation ordered the Constitution to be transmitted "to the several Legislatures, in order to be sub-

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mitted to a *convention of delegates chosen in each State by the people thereof*, in conformity to the resolves of the Convention." (1 Stor. Const. § 277.)

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1788. September 13. Eleven out of the twelve States which took part in the formation of the Constitution having ratified it by their conventions (North Carolina dissenting), the Congress of the Confederation appoints first Wednesday in January, 1789, for the choice of electors of president; the first Wednesday of February, 1789, for the assembling of the electors to vote for a president; and the first Wednesday in March, 1789, at the then seat of Congress (New York), as the time and place for commencing proceedings under the Constitution. (1 Stor. Const. § 278.)
1789. March 4. Day appointed for the organization of the new government; but so doubtful was the experiment deemed that *no quorum* of the two houses convened until April 6.
- " April 6. A *quorum* of the two houses of Congress was at length assembled, when the votes for president being counted, it was found that General George Washington was *unanimously* elected president.
- " April 30. General Washington was sworn into office, and the government of the United States then went into full operation, in all its departments.
- " September 24. Judiciary act passed, establishing the judicial department of the United States government (substantially as at present.)
1789. November 21. North Carolina ratified the Constitution of the United States.
1790. May 29. Rhode Island ratified the Constitution of the United States.
- " December. Seat of Federal government removed from New York to Philadelphia. (1 Stor. Laws U. S. 10.)
1792. Slaves in Virginia made *personalty*, having been declared to be *real estate* in 1705. (1 Stats. at Large (N. S.), 128.)
1800. November 17. The seat of the Federal government permanently established on the Potomac, at Washington city. (1 Stor. Laws U. S. 796.)
- " 39 & 40 George III., c. 77. Statute establishing a *legislative union* between Great Britain and Ireland. (1 Bl. Com. 104, and n. (15).)
1807. March 7. United States statute abolishing

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African slave trade by subjects of the United States. (2 Stor. Laws of U. S. 1050.)

1807. 47 George III., c. 36. Statute abolishing African slave-trade by British subjects. (1 Steph. Com. 103.)
1817. 57 George III. c. 6. Statute defining treason with increased strictness. (3 Hal. Const. Hist. Eng. 114, and seq.)
1819. 59 George III., c. 46. Statute abolishing in England, trial by *Wager of Battel*. (3 Steph. Com. 582, n. (u).)
1820. January 1. Statute abolishing in Virginia, the doctrine of *Carter v. Tyler* (1 Call. 143), touching the effect of limitations, coming after estates-tail converted into estates in fee-simple. (V. C. 1873, ch. 112, § 9; V. C. 1887, ch. 107, § 2421; 2 Min. Insts. 456.)
1820. January 1. Statute abolishing in Virginia the effect, at common law, of limitations to take effect on *failure of issue or of heirs, heirs of the body, &c.*, tying them up to refer to issue, &c., *living at the person's death, &c.* (V. C. 1873, ch. 112, § 10; V. C. 1887, ch. 107, § 2422; 2 Min. Insts. 455, 450 & seq.)
- “ January 1. Statute in Virginia empowering Courts of Chancery to direct the sale of lands belonging to infants and non-sane persons. (V. C. 1873, ch. 124, § 2; V. C. 1887, ch. 117, §§ 2616 & seq.; 1 Min. Insts. 470; 2 Do. 1005.)
1820. George IV. January 29.
1829. 9 George IV., c. 14. Lord Tenterden's Act, declaring that no promise *by words only* shall prevent the bar of the Statute of Limitations, unless it be in writing, signed by the party to be charged, &c. (3 Steph. Com. 555; 1 Chit. Cont. 221.)
1830. William IV. June 26.
- 1832, 2 William IV., c. 45. Statute reforming the representation in the English Parliament. (2 Steph. Com. 379.)
1834. 3 & 4 William IV., c. 27 and c. 74. Statute abolishing all warranties (that is, the ancient covenant real, so called), together with all real actions. (2 Min. Insts. 723; Rawle's Cov'nts of Title, 24.)
- “ 3 & 4 William IV., c. 42. Statute abolishing in England trial by *Wager of Law*. (3 Steph. Com. 525.)
- “ 3 & 4 William IV., c. 42, §§ 11, 12. Statute (together with *Rules of Court* of Hilary term. 1834) modifying the rules of pleading, (1),

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By substituting *special pleas* for the *general issues*; and (2), By doing away with needless forms. (Steph. Pl. 158, and 1st App. 186.)

1834. 3 & 4 William IV., c. 106. Statute modifying the Common Law *Customs of Descend.* 2 Min. Insts. 535 & seq., 540 & seq.)

1837. 6 & 7 William IV., c. 114. Statute allowing Counsel *in all criminal proceedings.* (4 Steph. Com. 426; Synops. Crim. Law, 245.)

1837. Victoria. June 20.

1837. 7 William IV. and 1 Vict. c. 26. Statute modifying the ceremonies to attend the execution of Wills. (Wms. Real Prop. 187, & seq.)

1845. 8 & 9 Vict. c. 106. Statute of *Grants*, declaring lands, as to the *immediate freehold* thereof, to *lie in grant*, as well as *in livery*.

1850. Statute of *Grants*, in Virginia, declaring lands, as to the immediate freehold thereof, to *lie in grant*, as well as *in livery.* (V. C. 1873, ch. 112, § 4; V. C. 1887, ch. 107, § 2417; 2 Min. Insts. 789.)

“ Statute in Virginia, essaying to abolish the *Rule in Shelley's case*, wherever the ancestor takes an estate *for his life.* (V. C. 1873, ch. 112, § 11; 2 Min. Insts. 400 & seq. 410.) And the Statute in Code of 1887, which does effectually abolish it. (V. C. 1887, ch. 107, § 2423.)

“ Statute in Virginia, modifying the ceremonies which are to accompany the making, &c., of Wills, after the model of 7 Wm. IV., and 1 Vict. c. 26. (V. C. 1873, ch. 118, § 1, & seq.; V. C. 1887, ch. 112, §§ 2514-2516; 2 Min. Insts. 1032 & seq.)

“ Statute in Virginia, modifying the rules of pleading, somewhat after the model of 3 & 4 Wm. IV., c. 42, and Rules of Court of Hilary term, 1834, but omitting, unhappily, to substitute special pleas for the *general issues.* (V. C. 1873, ch. 167, §§ 18, 21, 23, 25 to 31; Id. ch. 172, § 49; V. C. 1887, ch. 159, §§ 3258, 3261, 3263, 3265 to 3271; Id. ch. 164, § 3249; 4 Min. Insts. 590, 612, 1073 & seq., 1080-81.)

INSTITUTES
OF
COMMON AND STATUTE LAW.

INSTITUTES OF COMMON AND STATUTE LAW.

INTRODUCTION.

BEFORE entering upon an exposition of the doctrines and principles which are included within the wide domain of the "Common and Statute Law," it will be expedient to follow the example of the great commentator upon the laws of England, and to present, according to his general plan, an Introduction, which shall set forth sundry preliminary topics indispensable to the full comprehension of that which is to follow. Nor must the student be impatient if he find much transferred from Blackstone's pages, which *directly* is applicable to England alone. In due time it will be found that little or nothing is thus inserted which is not needful to elucidate the institutions of our own country, and necessary to a clear and intelligent apprehension of those rules of conduct governing our people, which are for some time to engage our inquiries. Deriving the bulk, nay almost the *entirety*, of our jurisprudence from England, we are hardly less interested than Blackstone's auditors in remarking its importance as a subject of thought and inquiry; in tracing out its originals in the mother country; in examining the causes which have affected its progress there; and in determining those local divisions within which it operates.

This Introduction, therefore, will be occupied, as Blackstone's is, with observations tending to illustrate, (1), The study of the law; (2), The nature of laws in general; (3), The kinds and general character of the laws of England, and incidentally, of our own country; and (4), The countries subject to the authority, and to the laws of England; with a glance also to the countries subject to our own laws;

Wherein consider,

SECTION I.

ON THE STUDY OF THE LAW.

I. THE STUDY OF THE LAW.

In order to bring together, in brief, what is most interesting and profitable in connection with the study of the law, we must note, (1), The utility of the study; (2) The causes of the neglect and disuse of it in the English Universities of Oxford and Cambridge; (3), The reasons for resuming it there; and (4), The methods whereby the study may be facilitated;

Wherein consider,

1^a. The Utility of the Study of the Law.

In discussing the utility of the study of the law to the various educated classes of society, it is of course not designed to include professional lawyers; although, when it is considered how limited, inaccurate and undigested is the knowledge with which too many enter upon the practice and painful responsibilities of the profession, words of warning and exhortation would not be misapplied. But it is proposed to exhibit the advantages of some acquaintance with the leading principles of jurisprudence with reference to (1), Persons of fortune; (2), Persons engaged in mercantile and mechanical pursuits; and (3), Members of the other learned professions;

Wherein consider,

1^b. Utility of the Study of the Law to *Persons of Fortune*.

The advantage to persons of independent estates of a knowledge of the leading doctrines of the law may be set forth, (1), In respect to their private concerns; and (2), In respect to business of a public nature;

Wherein consider,

1^c. In respect to their Private Concerns; Wherein consider,1^d. As regards their own Estates.

It is by no means safe for a man to depend, in intricate concerns of business, upon his own knowledge of legal principles and process. But some acquaintance with the elements of the law will enable him at least to understand where some of the quicksands are which occasionally swallow up fortunes, and admonish him to provide himself with competent guidance, when one wholly uninstructed may become a victim before he is aware of his danger. Sir Edward Sugden's "Letters to a Man of Property," in England, and in this country the numerous attempts by eminent writers at popular expositions of "Laws of Business," and "Hand-Books of Law for Business Men," sufficiently attest the general conviction, both within the profession and without, that a certain familiarity with the rudiments is eminently desirable to the two classes of men of property and men of business. (1 Bl. Com. 7.)

2^d. As respects the *Making of Wills*.

As the business of will-making is in too many instances transacted without professional advice, with no other assistance than may chance to be at hand, an intelligent acquaintance with the ceremonies required by law, in order to guard against fraud, and also with the force and effect of the limitations which men usually desire to have inserted in their wills, will often prove invaluable to others, his neighbors and friends, as well as to the possessor himself. The confusion and distress not seldom occasioned in families by the want of this knowledge; the uncertainty of the testator's meaning, and the difficulty and expense of ascertaining it after his death; the utter perversion of his real purpose, from the necessity of being governed by his unguarded and erroneous use of terms, combine to illustrate, very unhappily, how useful even a little systematic instruction upon such subjects may be. (1 Bl. Com. 7, 8.)

2^c. In respect to Business of a *Public Nature*.

All men of property are liable to be called upon to act in various public capacities of more or less importance, the duties of all of which would be discharged with far more efficiency to the public and credit to themselves, if they who exercise them were imbued with some legal knowledge. Of these functions it may suffice to mention those of jurors, justices of the peace, and legislators;

Wherein consider,

1^d. As Jurors.

The common law idea of a juror's office made it eminently important and dignified. He is called on to establish the rights, to estimate the injuries, to weigh the gravest accusations, and sometimes to dispose of the lives of his fellow-citizens. In this situation he has frequently to decide nice questions of great importance, in the solution of which some acquaintance with legal doctrines, either acquired beforehand, or picked up at hap-hazard in the progress of the cause, is indispensable, especially where the law and the fact are, as often happens, intimately blended together. And the general incapacity of even our best juries to do this with any tolerable propriety in intricate cases, in conjunction with the neglect of special pleading amongst us, and the disuse of the common law practice of the judge summing up the evidence in the cause, and charging the jury as to the law, has tended grievously to debase their authority, and to lead some so far to forget the experience of the past as to anticipate with satisfaction the abolition of trial by jury altogether. (1 Bl. Com. 8.)

2^d. As Justices of the Peace.

Formerly the ranks of justices of the peace in all our counties were replenished almost exclusively from the men

of property therein; and although modern innovation has done much to introduce into the commission of the peace a class of men who have no tangible evidence to give of "an interest in and attachment to the community" where they distribute justice, yet wherever men of property are willing to accept the office, if they are otherwise suitable, the people are usually well pleased to confer it upon them. And how ample a field of usefulness is here opened for a man to exert his abilities, by maintaining good order in his neighborhood; by punishing the criminal, the dissolute and idle; by protecting the peaceable and industrious; and above all, by healing petty differences, and preventing vexatious prosecutions! But in order to attain these desirable ends, the magistrate should understand his business, and have not the will only, but the ability also (under which must be included the knowledge), to administer legal and effectual justice. Else when, through passion, through ignorance, or through folly, he has mistaken his authority, he becomes the object of contempt from his inferiors, and of censure from those to whom he is accountable. (1 Bl. Com. 8, 9.)

3^d. As Legislators.

The duties of a legislator do not so much demand an accurate technical acquaintance with the details of the law, as that the person who proposes to engage with them should be imbued with a knowledge of the general principles of jurisprudence, and with those great doctrines of social and political right and wrong which ought, in the main, to guide his course. A mere lawyer may indeed be ignorant of, or inattentive to, those general principles and doctrines, as one not a professional jurist may be profoundly tinctured with them; but in the main, the best practical pathway to a really useful familiarity therewith is through the elementary studies which fit one for the bar. Very many of the problems with which a legislator must deal, immediately and vitally concern the rights of the citizen in respect to his person or his property, and cannot be satisfactorily solved without adverting to the existing rules which regulate those rights; so that, if the lawgiver has no familiar knowledge of such rules, he must either depend upon such extrinsic information touching them as he can procure, or must hazard both his own reputation and the welfare of the community by following his caprices or prejudices, or yielding himself helplessly to the persuasions of others. As, therefore, most men of any culture in this country expect at some time in the course of their lives to represent a smaller or larger constituency in the legislative councils of the State or Federal government, it would assuredly be well, ere they enter upon the

role of the lawgiver, to pay some attention to the rudiments of the law. It may well be a subject of amazement, as Blackstone observes, that whilst apprenticeships are held necessary in almost every art; whilst a long course of study must form the divine, the physician, and the practical professor of the laws; that every man thinks himself born a legislator. "Yet Tully," he continues, "was of a different opinion (De. Leg. 3, 180): '*Est senatui necessarium*,' says he, '*nosse rempublicam; idque late patet; quoniam hoc omni scientia, diligentia, memoria est: sine qua paratus esse senator nullo pacto potest*:'—it is necessary for a senator to be thoroughly acquainted with the constitution; and this is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can be possibly fit for his office." (1 Bl. Com. 9, 10.)

The mischiefs that annually arise to the public interests from inconsiderate alterations in the laws are too obvious to escape attention; and it is but too plain that they are, for the most part, owing to the defective education of our law-givers. "The common law of England," says Blackstone, "has fared like other venerable edifices of antiquity, which (requiring in some particulars to be modernized and adapted to the present needs of society) rash and inexperienced workmen have ventured to new dress and refine, with all the rage of modern (innovation, which they term) improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies and delays (which have sometimes disgraced the English as well as other courts of justice) owe their original, not to the common law itself, but to innovations that have been made in it by acts of parliament, 'overladen,' as Sir Edward Coke expresses it (2 Rep. Pref. ix.), 'with provisos and additions, and many times on a sudden penned or corrected by men of none or very little judgment in the law.' This great and well experienced judge declares that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. 'But if,' he subjoins, 'acts of parliament were, after the old-fashion, penned by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter; as, also, how far forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few questions in law arise, and

the learned should not so often and so much perplex their heads to make atonement and peace by construction of law, between insensible and disagreeing words, sentences and provisos, as they now do. And if this inconvenience was so heavily felt in the reign of Queen Elizabeth, you may judge how the evil is increased in later times, when the statute-book is swelled to ten times (and now to more than *fifty times*) a larger bulk, unless it should be found that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.'” (1 Bl. Com. 10, 11.)

Mr. Jefferson, who, in conjunction with two of the most eminent jurists of the time (Messrs. Edmund Pendleton and George Wythe), framed, in 1779, the first revisal of the laws of Virginia, mentions, with a just satisfaction and pride, that after the labor of two years and a half, they “brought so much of the common law as it was thought necessary to alter all the British statutes from *Magna Charta* to the present day, and all the laws of Virginia from the establishment of our legislature (or rather from the separation from the mother country), 4 Jac. I., to the present time, which we thought should be retained, within the compass of one hundred and twenty-six bills, making a printed folio of *ninety pages* only.” (1 Jeff. Mem. 36; 2 Min. Insts. 469.) Doubtless the task of these eminent men was materially facilitated by the usage which had prevailed from the origin of the colony, of making periodical revisals of the colonial statute law, thereby improving its scope and design, and simplifying and perfecting its phraseology. It was, notwithstanding, a great triumph of legislation thus to bring within so brief a compass all the enactments necessary for a modern civilized community; and it illustrates the expediency of invoking for such work the maturest wisdom and learning which the society whose laws are to be revised can supply. We have with us in Virginia, in the Revisal of 1849, another exemplification of the great value, in the function of law-making, of a large and accurate acquaintance with the common and existing statute law, as well as of practised ability in their actual applications. The just conception of the whole, and the symmetry of the parts, were, in some particulars, appreciably marred after it left the hands of the compilers, Messrs. Patton and Robinson; but in the eyes of well-judging lawyers, it is an enduring memorial of the capacity, learning, and honest pains-taking of the distinguished men who framed and marshalled its provisions.

- 2^b. Utility of the Study of the Law to *Persons engaged in Mercantile and Mechanical Pursuits.*

To persons engaged in mercantile pursuits, especially to

such who conduct them upon a large scale, some knowledge of the principles of what is denominated *mercantile law*, that is, of the law relating to mercantile contracts and transactions, is so indispensable that it is always acquired by such persons to a greater or less extent, although for the most part empirically, and of course superficially, and sometimes at the expense of great losses, which might and would have been avoided by careful instruction in, and the diligent study of, the elements of that branch of the science, even for two or three months.

The mechanical avocations in general demand less imperatively an acquaintance with the rudiments of the law, save only as those callings trench, as they often do, upon mercantile transactions. But the greater manufacturing operations call for some intimacy, not only with mercantile law, but with sundry departments of the profession besides, such as the law of patents, the law regulating the use of water-power, the law of railroads and other agencies of transportation, the law of mining, telegraph law, &c.

3^d. Utility of the Study of the Law to *Members of the other Learned Professions.*

Some degree of legal knowledge is so well calculated to discipline the understanding, and to enlarge its scope and capacity, that the study of the law might very well be recommended for that reason alone to all persons who are designed for employments calling specially into action the intellectual powers. The clergyman, the physician, the teacher, and the civil engineer, would certainly each and all be better fitted for their respective callings by some systematic study of the elements of jurisprudence.

The clergyman would find his special account in being able to advise his parishioners in respect to their secular concerns, in those plain cases which often perplex men without inducing them to invoke professional aid, and still more in indicating to them, in more complex matters, the propriety of not proceeding without legal advice. Engaged as he is about the bed of sickness and suffering, a knowledge of the principles which regulate the limitations of property, and the ceremonies attending the making of wills, would not seldom prove of signal advantage to the dying, and to those who survive them.

For the gentlemen of the faculty of physic, Blackstone observes, "I must frankly own that I see no special reason why they in particular should apply themselves to the study of the law, unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, and that not ludicrously, that it might fre-

quently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution." (1 Bl. Com. 14.) But since Blackstone wrote, *forensic medicine* has been publicly recognized as an important branch of legal study; and the converse has also been acknowledged, namely, that medical men should be somewhat informed, at all events as to those departments of the law to which their testimony as experts may relate, and as to what may be required to be proved or adjudged upon their testimony; as in respect to cases of death by apparently doubtful or suspicious means; to cases of unsound mind; to cases of questionable legitimacy; to cases of the birth of a *living* child, with a view to the husband's estate by the curtesy, and the like; and to cases when want of a sufficient disposing power in a last illness might be evident or presumed. The elaborate treatises of the Doctors Beck, of Dr. Taylor, Dr. Ray, and of Messrs. Wharton and Stillé, afford ample opportunities to the medico-juris-consult to pursue these studies with efficiency and success. (1 Bl. Com. 14, n. 3.)

As no one in human society has more need to acquaint himself with the traits and tendencies of man's nature than the teacher of youth, so to none is the study of the science of the law, whereby mankind seeks to restrain and direct the perverted faculties of the race, more important and desirable, independently of any practical application which may be made of it. But as a well informed teacher is often consulted, by reason of his supposed book-knowledge, about the business and domestic affairs of families, it will not a little increase his usefulness to be so far versed in legal principles as to be enabled to assist his neighbors when but little technical knowledge is required, and to warn them when professional aid should be sought.

The civil and mining engineer, on the other hand, will be none the worse for understanding, in a general way, the law of contracts, of highways and water courses, of mining and of transportation, of patent rights, of mechanics' liens, &c.

- 2^a. The Causes of the Neglect and Disuse of the Study of the Law, for many ages, in the Universities of Oxford and Cambridge.

In 1753, Sir William Blackstone, upon the advice of Mr. Murray, who shortly afterwards attained the dignity of Earl of Mansfield, which he has made illustrious, began to read in the University of Oxford, lectures upon the laws of England. It was a private adventure, unsustained by academic sanction, but it was eminently successful; and for the first time since the twelfth century it inaugurated, in the chiefest of the national schools, instruction in the laws of the

realm, as a branch of liberal education. One of the earliest fruits of the acknowledged excellence of these private lectures was the author's unanimous election to the first professorship of law, on the foundation established under the will of Charles Viner, the laborious compiler of that "*Abridgment of Law and Equity*," the twenty-four *folio* volumes of which our predecessors read, and we marvel at. To that place he was appointed on the 20th of October, 1758, and five days afterwards, in his thirty-fifth year, he delivered his "Introductory Lecture," which attracted universal applause, and by an enthusiastic biographer is pronounced to be "one of the most elegant and admired compositions which any age or country ever produced." The course which followed did not disappoint the expectation engendered by the "Introduction;" and in 1765, in order to guard against pirated editions, he himself published the first volume, under the title of *Commentaries on the Laws of England*; and in the course of the four following years, the other three volumes, thus completing a work, as the same biographer fondly declares, "that will transmit his name to posterity among the first class of English authors, and will be universally read and admired as long as the laws, the constitution, and the language of this country remain."

It cannot fail to awaken the curious inquiry of the student how it came to pass that in England, a country always governed by law, and supremely jealous of any other government, and a country in which the profession of the law has been ever the open pathway to the highest dignities and employments of the state, the public teaching of that law was sedulously excluded from the two principal seminaries of the land for more than four centuries. To that inquiry let us now address ourselves, and observe, (1), The reasons for the phenomenon assigned by Sir John Fortescue; (2), The true reasons;

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- 1^b. The Reasons assigned by Sir John Fortescue for the Neglect and Disuse of the Study of the Common Law in the Universities of Oxford and Cambridge.

Sir John Fortescue was a very distinguished lawyer of the 15th century, in the reign of Henry VI., and during the exile of that King, whom he followed abroad, was appointed tutor to the King's son, Edward, the Prince of Wales, and for the use of his royal pupil he is supposed to have composed at that time that most interesting tractate, "*De Laudibus Legum Angliæ*," which gives us the first minute history of the legal institutions of England, and the earliest insight into the professional education and habits of the period; and yet in a manner so brief, and a style so easy and natural, that the most elementary student may peruse it with satisfaction and profit. The prince having inquired "why the

laws of England, being so good, so fruitfull, and so commodious, are not taught in the Universities, as the civill and canon lawes are?" receives for answer what Blackstone justly denominates the "jejune and unsatisfactory reason," that "in the Universities, sciences are not taught but in the Latine tongue; and the lawes of England are to be learned in three several tongues, to-witte, in the English tongue, the French tongue, and the Latine tongue. * * * Wherefore, while the lawes are learned in these three tongues, they cannot conveniently bee taught or studied in the Universities, where onely the Latine tongue is exercised." However, the Chief Justice goes on to explain that little material inconvenience resulted from the anomaly, for that there was in the *Inns of Court*, between London and the then suburb of Westminster, in close proximity to the courts held in Westminster Hall, a juridical university of great fame, to which professional lawyers might resort with as much profit as to the teachings of a professor in the Universities. (1 Bl. Com. 16; Fortesc. De Laud. chs. 47, 48, 49.)

2^b. The true Reasons for the Disuse of the Study of the Common Law in the English Universities.

Let us note now Blackstone's more plausible and very instructive account of the causes which led to the banishment of the study of the municipal laws of England from her great Universities.

That ancient collection of unwritten maxims and customs which is called the common law, however compounded, or from whatever fountains derived, had subsisted in England immemorially; and although somewhat altered and impaired by the violence of the times, had in a great measure weathered (save as to landed property), the rude shock of the Norman conquest. It had become greatly endeared to the people in general, as well because its decisions were universally known and familiar, as because it was found excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Mr. Selden (*in Fletam*, 7, 7), in the monasteries, in the Universities, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors, the British Druids), they were peculiarly remarkable for their proficiency in the study of the law. *Nul-lus clericus nisi causidicus*, is the character given of them soon after the Conquest, in the reign of William I., by William of Malmesbury, (Eng. Chron. B. iv., c. 1). The judges, therefore, were usually created out of the sacred order, as was likewise the case among the Normans; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day. (1 Bl. Com. 17.)

But the introduction into England of great numbers of *foreign* clergy, in the reigns of the Conqueror and of his two sons, combined with other circumstances to work a great change in this general reception of, and zealous regard for, the common law. And we may observe that its exclusion from the principal seats of public education in the two Universities is to be referred to (1), The traditional source of the common law, and its sturdy adherence to the liberty of the subject; (2), The discovery at Amalfi (A. D. 1130), of Justinian's Pandects, and their introduction into England (A. D. 1138), together with an enthusiasm for the Roman law; (3), The devotion of the clergy to the Roman law, and their ascendancy in the Universities; and (4), The establishment of a juridical university in the Inns of Court, near Westminster Hall. (1 Bl. Com. 17 & seq.);

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1^c. The traditional Source of the Common Law, and its sturdy Adherence to the Liberty of the Subject.

The common law not being founded on definite enactments, nor indeed deposited in systematic treatises, but being handed down by tradition, use, and experience, and to be learned chiefly by frequenting the courts where it was administered, was abundantly distasteful to the foreign clergy who after the Conquest thronged into England. Its stubborn maintenance of the rights of the subject, its proclivities towards self-government, and its disinclination to the exercise of arbitrary power, contributed also to increase the disgust for it felt by the Norman and Italian ecclesiastics, who were solicitous to establish in its room a system of despotic exaction on the one side, and of smooth servility on the other. And this tendency received an impulse in the latter part of the reign of Henry I., the last of the Conqueror's sons, which had nearly completed the extinction of the common law.

2^c. The Discovery at Amalfi of Justinian's Pandects, and their Introduction into England, together with an Enthusiasm for the Roman Law.

The event which had well nigh proved fatal to the common law was the accidental discovery, in A. D. 1130, at Amalfi, now an obscure town in Italy, of a copy of the Digest or Pandects of Justinian, which had been, in a degree, lost to the world for full five centuries. The civil or imperial Roman law was thus brought into vogue all over the west of Europe, where before it was quite laid aside, and in a manner forgotten, though some traces of its authority remained in Italy and the eastern provinces of the empire. This now became in a particular manner the favorite of the Popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of

it was introduced into several continental universities, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science; and several nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law (being the best written system then extant) as the basis of their several constitutions; blending and interweaving it among their own feudal customs, in some places with a more extensive, in others a more confined authority. (1 Bl. Com. 18.)

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury, and extremely addicted to this new study, brought over with him in his retinue (A. D. 1138) many learned proficients therein; and among the rest, Roger, surnamed Vacarius, whom he placed in the University of Oxford, to teach it to the English people. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the *monkish* clergy, devoted to the will of a foreign primate, received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation, forbidding the study of the laws then newly imported from Italy, which was treated by the monks as a piece of impiety; and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries. (1 Bl. Com. 18, 19.)

3°. The Devotion of the Clergy to the Roman Law, and their Ascendency in the Universities of Oxford and Cambridge.

The ecclesiastics having thus begun by signaling their zealous attachment and devotion to the Roman imperial law, the nation seems from this time to have been divided into two parties, the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system that real merit which is to be found in each. The clergy extolled the principles of natural and

universal justice exhibited by the civil or Roman law in matters of contract and the general transactions of life, whilst the other party denounced the arbitrary and despotic maxims which recommended it as a favorite to the Romish clergy, and rendered it deservedly odious to the people of England. The fundamental principle of the Roman law—*quod principi placuit legis habet vigorem* (Inst. 1, 2, 6.)—cannot be reconciled with our *Magna Charta*, the *judicium parium vel lex terre*. The irreconcilable conflict between the partisans of the two systems was displayed on more than one memorable occasion, not always to the credit of the advocates of the common law. We find it, on the one hand, in the spleen with which the monastic writers speak of the municipal institutions of England; and on the other, in the defiant temper with which, at the famous parliament of Merton (20 Hen. III., A. D. 1236), the barons responded to the rational proposal of the prelates, to enact that bastards born should be legitimated by the subsequent marriage of their parents,—*una voce responderunt, quod nolunt leges Anglia mutare!* And we find the same jealousy prevailing more than a century afterwards, but exhibited in a manner more worthy of commendation, when, in 11 Rich. II. (A. D. 1388), the nobles declared, with a kind of prophetic spirit, “that the realm of England hath never been unto this hour, neither by the consent of our lord the King and the lords of parliament, shall it ever be ruled or governed by the civil law.” And of this temper between the clergy and laity many more instances might be given. (1 Bl. Com. 19, & n. (4).)

While things were in this situation, the clergy, finding it impossible to root out the common law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of King Henry III., episcopal constitutions or laws were published, forbidding all ecclesiastics to appear *in foro seculari*, in the temporal courts; nor did they long continue to act as judges there, not caring to take the oath of office—which was then found necessary,—that they would in all things determine according to the law and custom of the realm of England, though they still kept possession of the high office of Chancellor (doubtless from their possessing almost a monopoly of the learning of the times), an office then of little judicial power; and afterwards, as its business increased by degrees, they modelled the process of the court after the method of the Roman law. (1 Bl. Com. 20.)

But whithersoever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the Roman in exclusion of the common law; as in the spiritual courts of all denominations, the

University Courts, and the High Court of Chancery in all of which the proceedings, and in some of them the rules of decision, are to this day much conformed to the Roman law. And if it be considered that the Universities began about that period to receive their form of scholastic discipline; that they were then, and till the time of the Reformation, continued to be entirely under the influence of the Popish clergy, we may perceive the reason why the study of the Roman law was in those days pursued with such alacrity in these seats of learning, and why the common law was despised and neglected. (1 Bl. Com. 20, 21.)

And after the Reformation several causes conspired to prevent the municipal law of England from becoming a part of academical education. As, first, long usage and established custom; which as in everything else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the Roman law, considered upon the footing of reason, and not of obligation, which was well known to the instructors of our youth, whilst on the other hand they were totally ignorant of the merit of the common law. But the principal reason of all, that for so many ages hindered the introduction into the Universities of this branch of learning was, that the study of the common law, having been banished thence prior to the Reformation, fell into a quite different channel, and, until Blackstone's experiment, was wholly, and since has been chiefly, cultivated in another place. (1 Bl. Com. 21.)

4^c. The Establishment of a Juridical University in the Inns of Court, near Westminster Hall.

The common law being thus entirely abandoned by the clergy, the study and practice of it devolved of course into the hands of laymen, who entertained upon their parts a hearty aversion to the Roman imperial law, and made no scruple to profess their contempt, nay even their ignorance of it, in the most public manner. But still, as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and over-run by the civil, (a suspicion well justified by the frequent transcripts of Justinian to be met with in Bracton and Fleta), had it not been for the fixing of the Court of Common Pleas, in pursuance of *Magna Charta*, at Westminster, and the consequent assembling there of the principal common law jurisconsults; and as the result, the institution near by, in a monastic residence once belonging to a religious order, but subsequently known as the *Inns of Court*, of a seminary of juridical learning, which speedily

became a university, of scarcely less dignity than its older sisters of Oxford and Cambridge.

The judicial system of England, leaving out of view the local courts, originally consisted of a chief justiciary and certain assistants, who held their courts always in the hall of the King's palace, at whichever of the royal residences he might for the time being chance to sojourn, (whence it was styled the court of *Aula regia*). This was found to occasion great inconvenience to the suitors in private causes, so that it was made an article in *Magna Charta*, that "*common pleas*," i. e. common causes of the people, should no longer "follow the King's court, but be held in some certain place;" in consequence of which they have ever since been held, with some casual exceptions, in the palace of Westminster only. This brought together the students and practitioners of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate pursuit for the amusement of leisure hours, soon raised those laws to that perfection which they suddenly attained under the auspices of the English Justinian, King Edward I. (1 Bl. Com. 22, 23; 9 Hen. III., ch. 11.)

In consequence of this lucky assemblage, they naturally fell in a kind of collegiate order; and being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times, certain houses, (now called the Inns of Court and of Chancery) between the city of Westminster, the place of holding the King's courts, and the city of London. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and Roman. The degrees were those of *barrister* (first styled *apprentice*, from *apprendre*, to learn), who answered to our bachelors: as the state and degree of a sergeant, *servientis ad legem*, did to that of doctor. (1 Bl. Com. 23.)

The crown seems soon to have taken under its protection this infant seminary of the common law; and the more effectually to foster it, King Henry III., in the nineteenth year of his reign, issued an order to the mayor and sheriffs of London, commanding that no regent of any law school *within* that city should, for the future, teach law therein. (1 Bl. Com. 24.)

In this juridical university (for such it is insisted to have been by Fortescue and Sir Edward Coke), there are two sorts of collegiate houses; one called Inns of Chancery, in which the younger students of the law were usually placed,

"learning or studying the originals, and, as it were, the elements of the lawe, who profiting therein, as they grew to ripenesse, so are they admitted into the greater Innes of the same studie, called the Innes of Court." And in these inns of both kinds, Fortescue goes on to say, that knights and barons, with other noblemen of the realm, did place their children, though they desire not to have them learned in the laws, nor to live by the practice thereof; and that in his time there were about two thousand students at these several inns, nearly all of whom were of noble birth. (1 Bl. Com. 25; 3 Co. Pref. xxxvii.; Fortesc. De Laud. ch. 49.)

Thus it appears that, although under monkish influences the universities neglected the study of the municipal law of England, yet ample provision was made for it elsewhere, and that in Fortescue's time (the reign of Henry VI., say A. D. 1460), it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the law. But by degrees this custom has fallen into disuse; so that in the reign of Queen Elizabeth (say A. D. 1583), Sir Edward Coke (3 Co. Pref. xxxvii.) does not reckon above a thousand students (besides somewhat over three hundred who, in the Inns of Chancery, were engaged with the elements of the law), and in Blackstone's time (say A. D. 1765), the number was very considerably less. For which that writer assigns several reasons: as, first, that the Inns of Chancery were filled by the inferior branch of the profession (that is, attorneys, solicitors, etc.); secondly, because all academic government and superintendence, which in Fortescue's time was vigorous, had ceased to be exercised; and thirdly, because persons of birth and fortune, after completing their academic education at the universities, had seldom the resolution or leisure to enter upon a new scheme of study at another place. (1 Bl. Com. 25-'6.)

The Inns of Court at present seem to afford fair facilities for the acquisition of a liberal knowledge of the law; although the requirements are far inferior to what they formerly were in the palmier days of the University. The system is based upon certain regulations approved by the four societies of the Inns of Court, namely, Gray's Inn, Lincoln's Inn, the Inner Temple, and Middle Temple, and is supervised by a committee known as "The Council of Legal Education," composed of eight *Benchers* (officers so-called), two from each Inn of Court, of which four constitute a *quorum*. Instruction is given by six readers or lecturers, namely, (1), On jurisprudence and civil and international law; (2), On the law of real property; (3), On the common law; (4), On equity; (5), On constitutional law and legal history; and (6), On Hindoo and Mahommedan law, and

the law in force in British India. The teaching is done partly by lectures, and partly by interrogation, and the periodical examinations to test proficiency, are by printed and oral questions on books and subjects specified in a programme previously issued. In order to be admitted as a student to any of the Inns of Court, one must have passed a public examination at some of the universities, or must pass an examination on the English language, the Latin language, and English history; and in order to be called to the bar, the student must have attained the age of twenty-one years; must have "*kept twelve terms*;" and must have attended during one whole year the lectures and private classes of two of the readers, or have accomplished an equivalent amount of study under a competent private instructor. But some of these requirements may be dispensed with by the authorities, to a greater or less extent. For the purposes of education, the legal year is divided into *three terms* of unequal length; and what is meant by "*keeping terms*," is *dining* a certain number of days in each term in the hall of that Inn of Court where one is entered; that is, in the case of those who are at the same time members of any English, Scotch, or Irish university, three days, and in the case of other persons, six. (1 Broom. & Hadl. Com. 14, n. (4).)

3^a. The Reasons for Resuming the Study of the Municipal Law at the Universities of Oxford and Cambridge.

Blackstone dilates at some length upon the expediency and importance of restoring the teaching of municipal law to the universities, as in its elements a fit branch of liberal education, and as a safe and valuable precursor of that more direct and technical instruction necessary for the professional lawyer. It will suffice, however, here merely to sum up the reasons, without enlarging upon them, observing that, whilst some of these reasons are not applicable to the universities of this country, yet the benefit of systematic instruction and assistance in the acquisition of the legal elements, in some place of education, is too vital to be overlooked. (1 Bl. Com. 25, & seq.)

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- 1^b. Because in modern times (that is, in Blackstone's time), no systematic instruction is given, nor academic restraint employed at the *Inns of Court*.
- 2^b. Because a *new place* of instruction (after completing a course of general education), is unattractive to young men.
- 3^b. Because the study of law may sometimes be advantageously blended with academic studies.
- 4^b. Because, amid the quiet reflection of the Universities, improvements in the doctrines and processes of the law might often be devised; and

- 5^b. Because it would tend to attach to the Universities that peculiarly influential class of men, the legal fraternity.
- 4^a. The Methods whereby the Study of the Law may be facilitated.

It is an old and true saying, and in no branch of knowledge truer than in the law, that "reading makes the full man, writing the accurate man, and conversation the ready man" (Ld. Bacon, *Essays* L., 1 Vol.); and as fullness, accuracy, and readiness are all essential requisites to the really able and successful lawyer, these three agencies may form the prominent texts of the discussion. Before following out those details, however, it will not be amiss to quote the testimony of Sir Edward Coke: "Reading, hearing, conference, meditation, and recordation," says he, "are necessary, I confess, to the knowledge of the common law, because it consisteth upon so many, and almost infinite particulars; but an orderly observation in writing is most requisite of them all; for reading without hearing is dark and irksome, and hearing without reading is slippery and uncertain. Neither of them truly yield seasonable fruit without conference, nor both of them with conference, without *meditation and recordation*, nor all of them together without due and orderly observation. *Scribe sapientiam tempore vacuitatis tue*, saith Solomon. And yet he that at length by these means shall attain to be learned, when he shall leave them off quite for his gain, or his ease, soon shall he (I warrant him), lose a great part of his learning; therefore, as I allow not to the student any discontinuance at all (for he shall lose more in a month than he shall recover in many), so do I commend perseverance to all, as to each of these means an inseparable incident." (1 Co. Pref. xxvii., xxviii.)

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- 1^b. Reading systematically. Elementary Treatises upon the several Branches of the Law, in order to acquire distinct general Ideas.

All will allow that more or less of *systematic* reading of elementary treatises is an indispensable part of legal education; but there is unhappily a strong tendency to be satisfied with the *less*, and to repudiate the laborious *more*. There is furthermore a disposition which the generous lovers of the profession cannot but deplore, to imagine that no knowledge of anything outside of the law is needful, neither of language, nor science, nor literature, nor history; nay, that within the precincts of the law itself, nothing is worthy of attention but what is actually and directly demanded in the daily practice of the *trade* of an attorney. Liberal preliminary culture is undervalued, and an indiscriminating perusal of one or more text-writers, without any attempt to analyze or arrange their contents, and without habitual reflection upon the propositions contained therein, in order to test their reasonableness, their connexion, or their application, is con-

sidered too often as a sufficient preparation for a vocation as thoroughly intellectual as can engage a man's time or powers.

Reading under the direction, and with the constant aid of an instructor, is probably more necessary in the law than in most other subjects of the same recondite nature. Private instruction *may* be little less effective than that of the public teacher, but it ought to be observed that the mere fact that one reads in a lawyer's office is of little or no value. In order to make it beneficial, there must be a daily interrogation of the student, accompanied by abundant expositions of the text, and unceasing efforts on the part of the teacher to cause the pupil to note diversities, to apprehend what is intricate, and above all, to reflect upon whatever he learns, and to digest it. If a private instructor cannot be found able and willing to do this, he who desires the earliest and most complete success in the practice of the profession can do nothing else but resort to a law-school, where this needed systematic and daily instruction will be afforded him.

"The reason of the law is the life of the law," says Sir Edward Coke; "for though a man can tell the law, yet if he know not the reason thereof, he shall soon forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many others; and this knowledge will long remain with him." "But if by your study and industry you make not the reason of the law *your own*, it is not possible for you long to retain it in your memory." (1 Th. Co. Lit. 2.)

It is much more important to make one's self familiar with a few good text-writers, than to read many cursorily, and without thought and thorough analysis. And according to the writer's experience and observation, the book which ought always to constitute an indispensable part of every student's elementary reading, is Sir Edward Coke's first Institute, his Commentary on Littleton's Tenures; to which Hawkins' Abridgment of Coke-Littleton will be found a most useful aid.

When the rudiments of the law have been pretty fully mastered, the student will find much satisfaction and instruction in the cautious perusal of cases adjudged, not indiscriminately, as they occur in the Reports, but those which, upon a re-survey of his elementary course, he discovers to be *leading cases*, the types, exemplars, and sources of important principles and doctrines. Of these leading cases collections have now been made in several departments of the law, which afford to all ranks of the profession invaluable assistance, such as Smith's Leading Cases, White & Tudor's Leading Cases, edited with conspicuous ability by Hare & Wal-

lace, and Hare & Wallace's American Leading Cases, &c. Lord Coke does not omit to give the tyro a hint upon this point of the premature reading of cases. "I would advise our student," says he, "that *when he shall be enabled and armed* to set upon the year books, or reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched and applied, either in Westminster Hall (where it is necessary for him to be a diligent hearer and observer of cases at law), or at readings or other exercises of learning, he may find out and read the case so vouched; for that will both fasten it in his memory and be to him as good as an exposition of that case. But that must not hinder his timely and orderly reading, which (all excuses set apart) he must bind himself unto; for there be two things to be avoided by him as enemies to learning, *præpostera lectio*, and *præpropæra praxis*." (1 Th. Co. Lit. 2, 3.)

The same great lawyer further advises that the student read the latest reports first, for two causes, as he says: First, for that they are surest, and will the more safely settle his judgment; and secondly, for that they are easier to be understood than the more ancient; but after the reading of them, then to read the others and "*all* the ancient authors that have written of our law; for I would wish our student to be a *complete lawyer*." (1 Th. Co. Lit. 3.)

At present, one who aspires to be a "*complete lawyer*" must be far more eclectic than in Lord Coke's time. All the reports of adjudged cases then extant were not one fourth of those annually issued in England and the United States together, to say nothing of Australia and other British territories; and the text-writers known at that day constituted a mere handful, as compared to the ponderous weight of those under which a modern lawyer's shelves groan. The ancient books of the common law which Coke pronounces "right profitable" are no more than these following, namely, Glanvil, Bracton, Britton, Fleta, Ingham, *Nova Narrationes* (New Pleadings), Old Tenures, Old *Natura Brevium*, Littleton, Doctor and Student, Fitzherbert's *Natura Brevium*, and Stamford; to which he adds as auxiliaries, the Abridgments of Fitzherbert, Brooke, and Statham, the Book of Assizes, and for Pleading, the great book of Entries. (3 Co. Pref. vii.)

2^b. Making Written Abstracts, or *Common-placing* of Text-writers, and of Cases.

This *common-placing*, or constant use of the pen in condensing and arranging one's acquisitions, is what Lord Coke means by *recordation*; and it is impossible to exaggerate the benefit arising from the practice. It tends to clearness and distinctness of apprehension, it dissipates obscurities, it engenders habits of reflection, it encourages and aids the

memory, and places in the hands of the student a facility for frequent reviews, which is of itself a highly valuable aid to substantial and thorough acquisition. The student should suffer no book to pass through his hands without being subjected to this process of analysis with the pen.

3^b. Discussion of Law-points in Conversation, and in Debating-Clubs.

These conversational discussions (*conferences*, as they are denominated by Sir Edward Coke), are extremely beneficial to the student when conducted without heat, and with reference to the development of truth. Topics are thus surveyed from all sides, and one is obliged to consider the reason and grounds of the law with attention, and to note distinctions which might otherwise have escaped him. He learns also to attack and defend opinions, and finds by an early experience what it is expedient for him to recognize, that there are very few doctrines which men may not be found bold enough to question, and that propositions axiomatic to him do not seem equally beyond controversy to others. Great readiness is thus gained in the use of his knowledge, and also of his intellectual faculties; and this to a lawyer is an all important acquisition.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

II. The Nature of Laws in General.

The nature of laws in general may be set forth under the heads of, (1). The definition of law in its most comprehensive sense; and (2), The several kinds of law.

w. c.

1^a. The definition of law in its most comprehensive sense.

Law in its most comprehensive sense is a rule of action for intelligent beings, and in its practical and more limited sense for *men*. (1 Bl. Com. 39, and n. (1).)

2^a. The several kinds of law.

The several kinds of law are, (1), The Divine Law; and (2), Human Law.

1^b. The Divine Law.

The law which Jehovah prescribes for the government of his human creatures, is partly made known by the intuitive perceptions of conscience and by the deductions of reason, and in part has been directly revealed in that series of tracts which, from their supreme excellence, we call THE SCRIPTURES, or *To Bezzez c. c. The Book*. The divine law

may, therefore, be properly distributed under the two heads of (1), The *Natural Law*; and (2), The *Revealed Law*:

1^c. The Natural Law.

Of the countless multitudes of the human race who have lived and died, a very small proportion have enjoyed the light of God's *revealed* truth, and yet to none has "he left himself without a witness, in that he did good, and gave them rain from heaven and fruitful seasons, filling their hearts with food and gladness." His eternal power and Godhead have been manifested to all by the wonders of creation, and if men have glorified him not, it was not because they knew him not, but because they "became vain in their imaginations, and their foolish heart was darkened," so that having "changed the truth of God into a lie, and worshipped and served the creature more than the Creator," they were given up to "vile affections" and a "reprobate mind." (Rom. i. 19, 20, 25, 28.)

The Natural Law is plain enough to leave men without excuse for departures from it, but not so plain as to do away with the occasion for the Revealed Law, the effect of which, wherever it prevails, is to exalt the tone of private and of public virtue, and to purify and enlarge the affections of the heart.

2^c. The Revealed Law.

The Revealed Law, as contained in the Scriptures, so far as it affects to be general, is applicable alike to all generations and all races of men, and thus, by its comprehensive catholicity, vindicates its divine origin. So much of it as belongs only to the *municipal institutions* of the Hebrews, whilst doubtless perfect in its application to the people for whom it was designed, is of course of no binding obligation in respect to other nations, however expedient it may be to consult its provisions as suggestive of what omniscient wisdom has prescribed in the instance of one nation, and what, with proper modifications, may be adapted to other communities.

The perfection of the moral law revealed in the Bible, and especially in the New Testament, has been often the theme of panegyric, and the most eminent jurists of England and America have recommended the study of the Book as the very best preparative for the legal profession. Coke and Bacon, Hale and Sir William Jones, Marshall and Wirt, have employed the strongest language to express their sense of its value.

Sir William Jones, whose fine literary taste and wonderful stores of classic and oriental learning, conjoined with his eminence as a philosophic jurist, entitle his opinion to peculiar respect, thus expresses himself: "I have carefully and regularly perused these Holy Scriptures, and am of opinion

that the volume, independently of its divine origin, contains more sublimity, purer morality, more important history, and finer strains of eloquence than can be collected from any other book, in whatever language it may have been written."

There are a few works of no great size or cost, and therefore not difficult of access to the student, nor requiring much time to peruse, which may be recommended as helps to the study of the Scriptures, and at the same time as affording admirable specimens and examples of that kind of reasoning in which lawyers have need to be most expert. Of these it will suffice to name the following, viz.:

1. Butler's *Analogy of Religion, Natural and Revealed, to the Constitution and Course of Nature*.

Perhaps it may tend to recommend this noble performance to the legal neophyte that it was dedicated by the author to one of the most virtuous, as he was amongst the most eminent lawyers of his age, Charles, Lord Talbot, the Lord High Chancellor of England, of whom his biographer, Lord Campbell, himself successively Chief Justice and Lord Chancellor of England, was able to say that, "From the reign of Ethelred to that of George IV., this chancellor alone is without an accuser, without an enemy, without a detractor, without any one from malice or mistake to cavil at any part of his character, conduct or demeanor." (4 Camp. Chan'rs, 519-'20.)

The plan of the treatise in question is to show that whatever objections may be urged against the system of religion revealed in the Scriptures, and the facts upon which it is founded, analogous objections exist to the conduct and course of nature, and that he who rejects revelation because of such objections, in order to be consistent, must, by parity of reason, also reject the being and superintendence of a God.

2. Paley's *Horæ Paulineæ*.

This specimen of exquisite argumentation is peculiarly worthy of the attention of the juridical scholar. The design is to prove, by numerous slight and obviously undesigned coincidences between the narrative of St. Paul's life, journeyings and ministrations, contained in the Acts of the Apostles, and the Epistles which bear his name, that the *narrative is real and true*, and the *letters are genuine*.

This is a kind of reasoning for which lawyers have frequent occasion, and no student of law should fail to make himself familiar with this masterpiece.

Butler and Paley are both conspicuously candid and fair in argument, and the study of their works will be in that respect also of real professional utility.

3. Lord Lyttleton's *Conversion of St. Paul*.

This tract presents, with a force which it is difficult for an understanding not tutored and perverted by a reluctant heart to resist, that St. Paul's life, as exhibited in the Acts of the

Apostles, and the tenor of his numerous letters, clearly demonstrate that he could neither have been a deceiver nor have been himself deceived, and that his own narrative of his conversion (Acts xxvi. 12 and seq.) *must be true.*

4. Young's *Christ of History.*

The purpose of this interesting and convincing book is to point out the inimitable loveliness and perfect symmetry of the character of Christ as far exceeding any merely human conception, and to show that the unparalleled conception has been bodied forth in language simple, precise, graphic, and exquisitely defined beyond human rivalry, thus demonstrating that the character *is divine*, and the description *inspired.*

2^b. Human Law.

Human law is prescribed by human authority. It comprehends (1), International; (2), Constitutional; and (3), Municipal Law;

W. C.

1^c. International Law.

International law is the system of rules which regulate the intercourse and determine the rights and obligations of sovereign states. It is founded partly on the Divine law, as discerned by reason, or disclosed by revelation, and in part on mutual agreements, express or implied. The expositors of international law are approved text-writers, adjudications of international tribunals (such as prize-courts, and courts of mixed commission, or boards of arbitration), official opinions of professional advisers of government, etc. (1 Bl. Com. 43; Wheat. Internat. Law, 47.)

2^c. Constitutional Law.

Constitutional law contains the doctrines and principles which relate to the organization of government in general, and of the governments of the United States, and of Virginia, in particular. (Montesquieu's Spirit of Laws; Sidney on Government; Federalist; 2 Rives' Life, &c., of Madison; 5 Elliott's Debates; Madison's Virginia Report, 1799-1800.)

3^c. Municipal Law.

Municipal law is to the practitioner beyond comparison the most important of the three branches of human law. In setting forth very briefly its general nature, it is proposed to advert to, (1), Its definition; (2), The several parts of which every municipal law consists; (3), The obligation in conscience to obey the law; and (4), The interpretation of laws;

W. C.

1^d. The Definition of Municipal Law.

The definition of municipal law will lead us to note, (1), Blackstone's definition of it; (2), The objections thereto;

- (3), A preferable definition; and (4), The several particulars contained in the definition;

W. C.

1°. Blackstone's Definition of Municipal Law:

"A rule of civil conduct, prescribed by the *supreme* power in a State, *commanding what is right, and prohibiting what is wrong.*" (1 Bl. Com. 44.)

2°. Objections to Blackstone's Definition; w. c.

1st. It ascribes Laws to the *Supreme* Power in a State.

According to the just theory of government, as propounded by Montesquieu, neither of the three departments can be *supreme* without destroying liberty. (Montesq. Sp. Laws, B. XI., c. 6.) The legislative department, therefore, is not necessarily, and ought never to be supreme, and in Virginia is not so. It is simply the *law making* department.

2nd. The latter clause, "Commanding," &c., is either superfluous or erroneous.

If right and wrong are referred to the municipal law itself, then whatever it commands *is right*, and what it prohibits *is wrong*, and in that case the clause is *insignificant tautology*. But if right and wrong are to be referred to the law of God, as demonstrated by reason, or by revelation, then the clause is *erroneous*, or at least *deficient*; for though the municipal law may seldom or never *command* what is wrong, yet in multitudes of instances it *forbids* what, apart from the prohibition, is right; that is, *not wrong*. (1 Bl. Com. 44, n. (5).)

3°. A preferable Definition of Municipal Law.

"A *rule of civil conduct*, prescribed by the *law-making power* in a State." (1 Kent's Com. 447.)

4°. The several particulars contained in the Definition.

These several particulars will lead us to observe that, (1), Municipal law is a *rule*; (2), A rule of *civil conduct*; (3), A rule *prescribed*; and (4), A rule prescribed by the *law-making power* in a State;

W. C.

1st. Municipal Law is a *Rule*; w. c.

1st. It is *Permanent, Uniform, and Universal*,—and not *Fluctuating*, nor *Transient*, like an *Order*.

Hence *private* legislative acts do not conform to the proper idea of a *law*, and are to be therefore deprecated. The occasion for them is much circumscribed in Virginia, by the abolition of estates-tail, and by committing the sales of the interests of infants, lunatics, etc., and of future and contingent interests, to the courts of equity. (V. C. 1873, ch. 116, § 9; V. C. 1887, ch. 107, § 2421; V. C. 1873, ch. 116, §§ 9, 20 to 24; V. C. 1887, ch. 107, §§ 2432-2436; Va. Const. 1869, Art. V. § 20; Palmer v. Garland, 81 Va. 444.)

2nd. It is *Coercive*—not merely *Advisory*.

- 3^g. It *Commands*—and does not *depend on Assent*. (1 Bl. Com. 44.)
- 2^f. Municipal Law is a Rule of *Civil Conduct*; w. c.
- 1^e. It relates to *Conduct* not to *Opinion or Faith*.
- 2^e. It relates to *Civil Conduct*—Conduct as a *Citizen*,—not *Moral Conduct*.
(1 Bl. Com. 45.)
- 3^f. Municipal Law is a Rule *Prescribed*.

Hence *retrospective* laws do not fully correspond with the definition of a law, since they have for their subject one's *past conduct*. They are sometimes void, and are never favored; nor in construing a law can a retro-active effect be allowed, unless it be in plain terms retro-active. (1 Bl. Com. 45-'6; 1 Tuck. Com. 3, B. I; Elliott's Ex'or v. Lyell, 3 Call, 277; Com'th v. Hewitt, 2 Hen. & M. 181; Gaskins v. Com'th, 1 Call, 197; Ryan's Case, 80 Va., 387; City of Richmond v. Supervisors, 83 Va., 212; Baughner v. Nelson, 9 Gill (Md.), 299; Goshen v. Stonington, 4 Conn. 209, (10 Am. Dec. 121; S. C. Note of Ed. 131); Potter's Dwar. Stats. 162-'3, & seq. n. (9);)

w. c.

- 1^g. The several Classes of Retrospective Laws.

The classes of retrospective laws include, (1), Retrospective laws touching crimes; (2), Retrospective laws touching civil rights; and (3), Retrospective laws touching civil remedies;

w. c.

- 1^h. Retrospective Laws touching *Crimes*.

These are called *ex post facto* laws; they are laws which make an act punishable in a manner in which it was not punishable when committed; or which change the rules of evidence so that less or different testimony is required to convict. (Fletcher v. Peck, 6 Cr. 87; Cummings v. Missouri, 4 Wal. 277; Synops. Crim. L. 8.)

Ex post facto laws are prohibited by the Federal Constitution, both to the States and to Congress, and also by the Constitution of Virginia to the legislature of the State. (Va. Const. 1869, Art. V., § 14; U. S. Const. Art. I., § x. 1; Id. § ix. 3; Federalist, Nos. 44, 84; 2 Stor. Const. §§ 1373, 1345; *Ex-parte* Garland, 4 Wal. 333; Cummings v. Missouri, 4 Wal. 277.)

- 2^h. Retrospective Laws touching *Civil Rights*.

Laws *impairing the obligation of contracts* are prohibited to the *States* by the Federal constitution, and to Virginia by the constitution of the State also. (U. S. Const. Art. I., § x. 1; Va. Const. 1869, Art. V., § 14; Hepburn v. Griswold, 8 Wal. 603; Legal Tender Cases, 12 Wal. 457; Homestead Cases, 22 Grat. 266; Antoni v. Wright, Id. 833; Gunn v. Barry, 15 Wal. 610.)

Other retrospective laws *touching rights* are objectionable, and they are never construed retrospectively, unless in pursuance of *express words*, or at least of clearly manifested intention; but they are not void. (Baughner v. Nelson, 9 Gill, (Md.), 299; Elliott's Ex'or v. Lyell, 3 Call, 279; Com'th v. Hewitt, 2 Hen. & M. 181; Gaskins v. Com'th, 1 Call, 197; Day v. Pickett, 4 Munf. 109; Dash v. Van Kleeck, 7 Johns. (N. Y.) 177; Satterlee v. Mathewson, 2 Pet. 380; Bac. Abr. Stat. (C.); Drehman v. Stifle, 8 Wal. 603, and cases cited; Watson & als. v. Mercer, 8 Pet. 110; Balt. & Susq'h R. R. Co. v. Nesbit & als. 10 How. 401 '2; Duval v. Malone, 14 Grat. 28; Danville v. Pace, 25 Grat. 19; Price v. Harrison, 31 Grat. 119-'20; Peters v. The Auditor, 33 Grat. 374; Crigler v. Alexander, 33 Grat. 676-'7; Ryan's Case, 80 Va. 387; City of Richmond v. Supervisors, 83 Va. 212; Cooley Const. Lim. 370; Pot. Dwar. Stats. 162-166; Hartman v. Greenhow, 102 U. S., 672; Virginia Coupon Cases, 114 U. S., 269.)

3^b. Retrospective Laws touching *Civil Remedies*.

Retrospective laws touching civil remedies are not only admitted to be valid, but are comparatively free from objection, unless they materially affect the *obligation of contracts*, as by depriving the creditor of any effective legal remedy against his debtor's property, or by prohibiting the judicial sale thereof for less than a certain proportion, such as two-thirds of its appraised value, or other like device. In all such cases the statutes, although affecting to deal with those remedies only, yet in fact impair the obligation of the contract, and are therefore void. The reason why retrospective laws touching *remedies* are viewed with so much more leniency than when they relate to *rights* seems to be that, in the nature of things, remedies must be frequently changed in order to subserve the convenience of society; and if the practitioner were obliged to remember what remedy was applicable, having reference to the date of the cause of action, greater embarrassments would result than from allowing the statute which alters a remedy to have a retro-active effect. (Bronson v. Kinzie & als., 1 How. 311; McCracken v. Haywood, 2 How. 645; Curran v. Arkansas, 15 How. 304; Howard v. Bugbee, 24 How. 464; Von Hoffman v. City of Quincy, 4 Wal. 548; Quackenbush v. Danks, 1 Denio, 128; 3 Do. 594; State v. Carew, 13 Richardson (Law), (S. C.) 506; Taylor v. Stearns & als., 18 Grat. 244, 262, 272.)

But even as to *remedies* merely, a retrospective effect is not allowed to any law, unless such effect be clearly contemplated by the legislature. (Baughner v. Nelson, 9 Gill, 299; Elliott's Ex'or v. Lyell, 3 Call, 279, & seq.; Bac. Abr. Stat. (C.); Duval v. Malone, 14 Grat. 28.

2^c. The Time whence Laws take Effect; w. c.

1^h. Doctrine at Common Law.

Statutes took effect, at common law, from the first day of the session of parliament at which they were enacted, unless another day were named. (*Rex v. Thurston*, 1 Lev. 91; *Latless & als. v. Holmes*, 4 T. R. 660; *Bac. Abr. Stat.* (C).)

2^h. The modern English Rule.

By the modern practice statutes take effect in England from the time they receive the Royal assent, if no other day is specified. (*Stat. 33 George III., c. 13*; 1 Bl. Com. 185, n. (77).)

3^h. Rule in Virginia.

Statutes take effect in Virginia from 1st July ensuing their enactment, if no other day be specified. (*V. C. 1873, ch. 15, § 3*; *V. C. 1887, ch. 2, § 4*.) But generally it is specified in the statute that it shall be in force from the day of its passage, which it is presumed means its *approval by the governor*, or its enactment over his *veto*. (*Va. Const. 1869, Art. IV., § 8*.)

4^h. Rule in respect to United States Statutes.

United States statutes take effect from the time they receive the President's approval, or are passed over his *veto*, if no other day is specified. (*Rev. Stats. U. S. (2d ed.) § 204*.)

3^g. Mode of Publication of Laws; w. c.1^h. Mode of Publication at Common Law.

Before the invention of printing, laws were published by the sheriff of every county (in pursuance of the king's writ, sent at the end of every session, together with a transcript of the acts), by proclaiming them at his county court, and keeping them there, for copies to be made by all who chose. Since the invention of printing, they are made known by publication by the king's printer, and distribution of the printed copies through the realm. (1 Bl. Com. 185, and n. (78).)

2^h. Mode of Publication in Virginia.

In colonial times, copies of the statutes were read publicly, on the first day of the "*mounthlie corts*," and were kept in those courts to be read by all who desired it. (1 Hen. Stats. 177.) At present printed copies are distributed to every judge, justice, and clerk of any court in the State; to every attorney for the commonwealth, and to every sheriff and sergeant, besides to a great number of other public officers, and public institutions. (*V. C. 1873, ch. 15, §§ 4 to 14*; *V. C. 1887, ch. 19, §§ 278-9*.)

3^h. Mode of Publication of the United States Statutes.

The Statutes of the United States are printed under direction of the Secretary of State, and pamphlet copies distributed to the various officers and institutions of the

United States, and 10,000 copies amongst the several States and Territories in proportion to the number of their senators, representatives and delegates in Congress. An indefinite number of copies is also printed for sale at cost, with ten per cent. added. (Rev. Stats. U. S. (2d ed.) pp. 1090-1091; Supp. to Rev. Stats. p. 51.)

4f. By the *Law-making Power* in a State; w. c.

In discussing the law-making power, it will be necessary to advert to, (1), The nature of Society and of Civil Government; (2), The qualities which ought to characterize government; (3), The different forms of government; and (4), The obligation of every Society to cause the best possible laws to be created;

w. c.

1^g. The Nature of Society, and of Civil Government.

Society was ordained by God, who created mankind with such wants and affinities that they cannot exist without it. And as society cannot exist without restraints, and some agency to enforce them, God ordained government also. "The powers that be are ordained of God." (1 Bl. Com. 47, 48; Exod. xviii. 27; Deut. xvi. 18-20; Prov. viii. 15; Rom. xiii. 1-4.)

2^g. The Qualities which *ought* to Characterize Government.

Government ought to possess *wisdom* to discern the real interest of the community; *goodness* to endeavor to pursue it; and *power* to carry such knowledge and intention into effect. (1 Bl. Com. 48.)

3^g. The Different Forms of Government.

The different forms of government may be classed under the two heads of, (1), The simple forms; and (2), The mixed forms:

w. c.

1^h. The Simple Forms of Government.

The simple forms of government are reckoned to be only three, namely, (1), A democracy; (2), An aristocracy; and (3), A monarchy. (1 Bl. Com. 49, &c.)

w. c.

1ⁱ. Democracy.

Democracy is where the government is lodged in an assembly consisting of all the free members of the community.

It abounds in *honesty of intention* (towards itself), and in patriotic zeal; but is wanting in wisdom to devise and in energy to execute. (1 Bl. Com. 49.)

It is also, from its nature, confined within local limits so narrow as constantly to jeopard its safety and independence.

2ⁱ. Aristocracy.

Aristocracy is where the government is lodged, not by

delegation, but by inherent authority, in a council composed of a few select members.

It excels in *wisdom* of design, but is wanting in honesty of purpose towards the body politic, and in vigor of execution. (1 Bl. Com. 49, 50.)

3ⁱ. Monarchy.

Monarchy is where all power is entrusted to a single person.

It is distinguished for vigor and concentration of purpose, but is apt to be deficient in honesty of design towards the people, and in wise providence. (1 Bl. Com. 49, 50.)

2^b. The mixed Forms of Government.

The simple forms of government being thus all found wanting in one or other of the necessary attributes of wisdom, honesty and vigor, mankind resorted at an early period to forms compounded in various proportions and modes, of the simple forms, and with various success. Two additional principles were found to be also capable of beneficial application, namely, the principle of *representation of the people* by delegates chosen by themselves, and of the *confederation* of several communities, so as to commit the common affairs of all the members to a common government, whilst the local and separate concerns of each were left to be administered by their several governments.

The most successful instances of mixed forms of government presented in history, are those of England and the United States, and of the several States composing this Union. The governments of England and of the United States have introduced with wonderful efficiency the *principle* of confederation, and those governments, as well as the governments of the several States, have employed, with corresponding effect, the principle of representation, together with a blending of some or all of the simple forms.

England governs her vast dependencies in every part of the world, as much as possible by local administrations, and local legislatures, composed of representatives of the people, the imperial government reserving to itself only so much control as relates to the interests of the whole empire. And so in the United States, the Federal government exercises such powers as are confided to it by the Federal constitution, being such as relate to and concern the well-being of the whole Union, whilst all other political authority, not specifically withheld, belongs to the governments of the several States, within their respective limits. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U. S. Const. Amendments, Art. X.)

Let us note now the admixture of the simple forms of government which are to be found in (1), The English Constitution; and (2), The American Constitutions;

W. C.

1ⁱ. The English Constitution.

The English Constitution consists of the elements of (1), Monarchy; (2), Aristocracy; and (3), Democracy, qualified by the principle of representation:

See 1 Bl. Com. 50, 51.

W. C.

1^k. Element of Monarchy.

The King.

2^k. Element of Aristocracy.

The House of Lords.

3^k. Element of Democracy.

The House of Commons, modified by the *Representative feature*, is the modern substitute for Democracy, and is divested of several of its most glaring and dangerous defects.

2ⁱ. The American Constitutions.

The American Constitutions consist of the elements of, (1), Monarchy; and (2), Democracy, qualified by the principle of representation; W. C.

1^k. Element of Monarchy.

The President and the Governors of the States.

2^k. Element of Aristocracy.

Wholly wanting.

3^k. Element of Democracy.

The Chambers of Legislature embrace the *representative feature*, and are divided into two bodies (sometimes, as in Congress, based on different principles), whereby the undue superiority which naturally attaches to the law-making power is counteracted, greater deliberation is secured, and the representation of different interests may be obtained.

4^g. The Obligation of every Society to cause the best Laws possible to be enacted.

Every state is bound to *preserve and perfect* itself. (Nat.

B. L. §§ 14 to 37.)

2^d. The several Parts of a Law.

Every law consists of several parts, which, however, may be in different portions of the code, namely, (1), The declaratory and directory parts; (2), The remedial part; and (3), The vindicatory part;

W. C.

1^o. The Declaratory and Directory parts.

The *declaratory* part of a law clearly defines the rights to be observed and the wrongs to be eschewed within the purview of the law, whilst the *directory* enjoins the observance of

those rights, and the avoidance of the wrongs. See 1 Bl. Com. 53 to 55.

2^o. The Remedial part.

The *remedial* part of a law points out the methods whereby to recover one's rights, and to redress his wrongs. See 1 Bl. Com. 56.

3^o. The Vindictory part.

The vindictory part of a law contains the *sanction*, which is always necessary to secure obedience, and to that end proposes *punishment*, rather than *rewards*. (1 Bl. Com. 56-7.)

3^d. The Obligation to obey the Laws.

It is a *conscientious* obligation, whether the law relate to a thing *malum prohibitum*, or *malum in se*; for without obedience, society (which is a divine ordinance) cannot exist. (1 Bl. Com. 58, and n. (8).) And this deduction of reason is confirmed by the Scripture precepts, "Submit yourselves to every ordinance of man, for the Lord's sake," (1 Pet. ii. 13); "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God; whosoever therefore resisteth the power *resisteth the ordinance of God*," (Rom. xiii. 1); "Wherefore, ye must needs be subject, not only for wrath, but also for conscience sake," (Rom. xiii. 5.)

4^d. The Interpretation of Laws; w. c.

1^o. The Method of Interpretation employed in the Roman Law.

The Roman law devolved the ultimate interpretation of its enactments upon the Prince, who was the *law-giver*. This is at war with the just and necessary distribution of powers in a well-ordered government, and is the essence of tyranny. (Montesq. Sp. of L., B. XI., c. VI.; Va. Const. 1869, Art. II.)

2^o. The signs whereby to interpret the Will of the Law-giver.

The signs whereby the will of the law-giver is manifested are, (1), The *words* used by him; (2), The *context*; (3), The *subject-matter*; (4), The *effects and consequences*; (5), The *reason and spirit* of the law.

See 1 Bl. Com. 69;

w. c.

1^o. The Words.

Words are to be taken in their usual and popular sense, except when they are *technical*, and then according to the acceptance of the learned in the art. (1 Bl. Com. 59.)

2^o. The Context.

The context is very important in ascertaining the meaning. Thus the preamble often helps the construction, as do other parts of the same law, or other laws *in pari materia*. (1 Bl. Com. 60; Bac. Abr. Stat. (I) 3; Dillard v. Tomlinson, 1 Munf. 206; Ailesbury v. Patteson, 1 Dougl. 27.)

3^o. The Subject-Matter.

Words are to be always understood as having regard to the *subject-matter*; *e. g.*, Stat. Edw. III., prohibiting the "purchasing of *provisions* at Rome," meaning not supplies of food, but church benefices. (1 Bl. Com. 60.)

4^t. The Effects and Consequences.

An absurd conclusion, or one productive of *general* inconvenience, is a strong argument against the interpretation which leads to it. The *argumentum ab inconvenienti* is powerful in law. Thus a law "forbidding the drawing of blood in the streets," is not to be construed to apply to a surgeon who bleeds a man in a fit, etc. (1 Bl. Com. 60; 1 Th. Co. Lit. 18, 19, & n. (10).)

5^t. The Reason and Spirit of the Law.

The *cause* which moved the legislature to enact the law is always potent to determine its meaning, if the words are dubious. (1 Bl. Com. 61.) This is sometimes denominated the *equity* of the statute; and thus we are led to consider the sense in which English and American lawyers use the word *equity*. There is, (1), Natural equity, and (2), Technical equity;

w. c.

1^g. Natural Equity.

Natural equity is the mode of interpreting laws by the *reason* of them, or it is the "correction of that wherein the law (by reason of its universality) is deficient" (1 Bl. Com. 61); which must by no means be confounded with *technical equity*, so familiar to English and American jurists.

2^g. Technical Equity, as known to English and American Jurisprudence; w. c.

1^h. Definition of Technical Equity.

Technical equity is that portion of remedial justice which is exclusively administered in courts of equity, in contradistinction to that portion of remedial justice which is exclusively administered by courts of common law. (1 Stor. Eq. § 25.)

2^h. Principal Distinctions between Courts of Equity and Courts of Common Law;

(1 Stor. Eq. §§ 26 to 33; 3 Bl. Com. 430 & seq.; Id. 436, &c.; Fonbl. Eq. 7, n. (e);)

w. c.

1ⁱ. Difference in the *Rights which they recognize.*

e. g., Trusts and other Equitable Estates, Mistakes, Frauds, Unconscionable Bargains, &c., which are for the most part cognizable in equity, and not in the courts of common law. (1 Stor. Eq. §§ 26 to 29.)

2ⁱ. Difference in the *Forms of Remedy they apply.*

Thus a court of equity grants an *injunction* to prevent an irreparable injury; *coerces a disclosure* on oath; enforces *specific performance* of contracts, &c. (1 Stor. Eq. §§ 26

to 28, 31; all which forms of remedy are unknown to the courts of law.

3'. Difference in the *Modes of Proceeding* they adopt.

Thus a court of equity tries questions of fact without a jury, by the court; upon testimony never oral, but always in the shape of depositions, &c. (1 Stor. Eq. § 31); whilst in the courts of law, questions of fact are in almost all cases decided by a jury, upon *oral* testimony given in the presence of the court and jury; and in no case at common law could a *discovery* be demanded from the adversary.

SECTION iii.

OF THE LAWS OF ENGLAND AND OF VIRGINIA.

III. The Laws of England and of Virginia.

The laws of England consist of, (1), The *lex non scripta* (unwritten law), or common law; (2), The *lex scripta*, or statute law; and under this head may also be mentioned, (3), The law prevailing in Virginia;

W. C.

1^a. The *Lex non scripta* (unwritten law), or Common Law.

The common law, in its most comprehensive sense, embraces *general customs*, pervading the whole realm, *particular customs*, prevailing only in certain places, and *particular laws*, which have been by degrees incorporated into the common law, to a certain extent. But in its more ordinary acceptation, the common law includes only *general customs* and *particular laws*, and not customs of particular places. It is in this sense that the common law has been introduced into Virginia. (1 Bl. Com. 62; V. C. 1873, ch. 15, § 1; V. C. 1887, ch. 2, § 2);

W. C.

1^b. Why called *Lex non scripta*.

Not because it is at present *oral*, and is transmitted only by tradition, but because its original institution is not set down in writing, like statutes; the monuments and evidences thereof being contained in the records of courts of justice, in books of reports of judicial decisions, and in text-writers of authority. (1 Bl. Com. 63-4; Hale's Hist. Com. Law, 1, 2.)

2^b. The Rise and Original of the *Lex non scripta*, or Common Law; W. C.

1^c. *Dome-Book*, or *Liber-Judicialis* of Alfred.

This book was compiled by Alfred, from the various local customs of the several provinces of his kingdom, say A. D. 890. It was extant so late as the time of Edward IV. (say A. D. 1461), but is now lost. (1 Bl. Com. 64-5; 1 Reeves' Hist. Eng. Law, 25.)

- 2^c. Resolution of Alfred's Code into three Systems of Laws, about A. D. 1000.

See 1 Bl. Com. 65; 1 Reeves' Hist. Eng. Law, 25 '6; Hale's Hist. C. L. 53 '4.

W. C.

- 1^d. *Mercen-Lage*,—or Mercian Laws.

Prevailing in many of the midland counties, and in those bordering on Wales.

- 2^d. *West-Saxon Lage*,—or West-Saxon Laws.

Prevailing in the south and west, from Kent to Devonshire.

- 3^d. *Dane Lage*,—or Danish Laws.

Maintained in the rest of the midland counties, and on the eastern coast.

- 3^c. Digest of Edward *the Confessor*, say A. D. 1041.

This was a new edition, it would seem, of Alfred's *Dome-Book*, with additions and improvements. Hence Edward is styled the *Restitutor*, as Alfred is the *legum Anglicanarum Conditor*; and the law thus systematized is known as *jus commune*, or *Folk-rihte*. (1 Bl. Com. 66; 1 Reeves' Hist. E. L. 25 '6; Hale's Hist. C. L. 5, n. (B), 53 '4.)

- 3^b. The several Parts of the *Lex non scripta*, or Common Law.

The several parts of the common law include, (1), General customs; (2), Particular customs; and (3), Particular laws, that is, the civil (or Roman), and the canon laws;

W. C.

- 1^c. General Customs,—or the Common Law, more usually so called.

See 1 Bl. Com. 67 and seq.

The general customs constituting the bulk of the common law are founded on immemorial and universal usage, evidenced by judicial decisions and approved text-writers. The customs thus composing the common law arise in part from statutes worn out by time, according to Lord Hale.

(Hale's Hist. of Com. Law, and seq. 89; Bac. Abr. Statutes;

W. C.

- 1^d. Effect of Judicial Decisions in ascertaining the Law.

Precedents must be observed and respected when they have been acted on as the basis of transactions of business, because of the unendurable inconvenience which otherwise would ensue from the *uncertainty* of the law. (1 Bl. Com. 69 to 71.)

- 2^d. The Subjects to which *General Customs*, or the Common Law, relate.

The common law relates to and determines the form and obligation of contracts, estates in real property, marital rights of husband and wife, civil remedies, the general doctrine of crimes and punishments, &c. (1 Bl. Com. 68.)

3^d. Depositaries of the Common Law.

The depositaries of the common law are, (1), Reports of adjudged cases; and (2), Approved text-writers; (1 Bl. Com. 71 to 73, and 72, n. (10); 1 Reeves' Hist. Eng. Law, 221; 2 Do. 86, 279; 1 Kent's Com. 470, &c.); w. c.

1^e. Reports of adjudged Cases.

See 1 Kent's Com. 470, 498; 1 Bl. Com. 71-2; Wallace's Reporters;
w. c.

1^f. The Year Books.

From 1 Edw. I. to 28 Hen. VIII. (A. D. 1307 to 1537.)

2^f. Coke's Reports.

From Elizabeth to James I.

3^f. Croke's Reports.

From Elizabeth to Charles I.

4^f. Dyer's Reports.

From Henry VIII. to Elizabeth.

5^f. Plowden's Reports.

From Edward VI. to Elizabeth.

6^f. More modern Reports.2^e. Approved Text-Writers; w. c.1^f. Glanvil—"Treatise on the Laws and Customs of England."

Written *temp.* Henry II.—say A. D. 1187.

2^f. Bracton—"Treatise of the Laws and Customs of England."

Written *temp.* Henry III.—say A. D. 1265.

3^f. Fleta—"Commentary upon the English Law."

Written *in the Fleet prison* (whence its title), *temp.* Edward I.—say A. D., 1285.

4^f. Littleton's Tenures.

Written *temp.* Edward IV.—say A. D. 1475.

5^f. Brooke's Grand Abridgment of the Law.

Written *temp.* Elizabeth,—say A. D. 1573.

6^f. Fitzherbert's Grand Abridgment of the Law.

Written *temp.* Elizabeth,—say A. D. 1565.

7^f. Coke's Institutes.

Written *temp.* James I. and Charles I.—A. D. 1621 to 1634;

w. c.

1^g. First Institute.

Commentary on "Littleton's Tenures,"—A. D. 1621.

2^g. Second Institute.

Commentary on Ancient Statutes,—A. D. 1629 to 1634.

3^g. Third Institute.

Treatise of Pleas of the Crown,—A. D. 1629 to 1634.

4^g. Fourth Institute.

Treatise on the Jurisdiction of Courts,—A. D. 1629 to 1634.

2^c. Particular Customs.

Particular customs are such customs as do not prevail throughout the kingdom, but affect only the people of particular districts, or particular classes of persons. (1 Bl. Com. 74 & seq.)

Let us take notice of, (1), Certain instances of particular customs; and (2), The rule relating to particular customs; w. c.

1^d. Instances of Particular Customs; w. c.

1^o. Custom of Gavelkind.

The custom of gavelkind prevails especially in the county of Kent, and in some other places. Its principal characteristic is that *all* the sons shall succeed to the inheritance alike, &c. (1 Bl. Com. 75; 2 Do. 84.)

2^o. Custom of Borough-English.

The custom of borough-English prevails in divers ancient boroughs. Its chief characteristic is that the *youngest son* shall be heir, instead of the oldest. (1 Bl. Com. 74; 2 Do. 83.)

3^o. Copyhold Customs.

Copyhold customs prevail in most parts of England, but only as customs of particular manors, or baronies. See 1 Bl. Com. 74; 2 Do. 95, & seq.; Id. 147, & seq.

2^d. Rules relating to Particular Customs.

Rules relating to particular customs are such as relate to (1), The proof of the custom; (2), The legality of the custom; and (3), The allowance of the custom. (1 Bl. Com. 76.)

w. c.

1^e. Rules touching the *Proof* of Particular Customs; w. c.

1^f. Rules Touching Proof of Gavelkind and Borough-English.

There is no need to prove that the custom of gavelkind or of borough-English exists, but only that the lands in question are subject thereto. Trial is by a jury, and not by the court.

2^f. Rules touching the Proof of the Customs of London.

The customs of London are proved by *certificate* from the Lord Mayor and Aldermen, by the mouth of the Recorder, and are not tried by a jury.

3^f. Rules touching the Proof of all other Private Customs.

All other private customs must be particularly *pleaded*, and as well the existence of the custom must be proved, as that the thing in dispute is within it. The trial is by jury.

2^e. Legality of Particular Customs.

An illegal custom is not to be regarded, in pursuance

of the maxim, "*Malus usus abolendus est.*" (1 Bl. Com. 76, &c.) We may note under this head, (1), The requisites of a good custom; (2), The legality of customs in Virginia; and (3), The contrast between custom and prescription;

W. C.

1^f. The Requisites of a Good Custom.

See 1 Bl. Com. 76, &c.

W. C.

1st. Long Continued.

In order to be supported as a good custom, it must appear to have continued so long that the *memory of man runneth not to the contrary.* (1 Th. Co. Lit. 35.) Immemorial continuance is presumed from *regular usage for twenty years*, not explained, or contradicted. (King v. Joliffe, 2 B. & Cr. (9 E. C. L.) 54.)

2nd. Uninterrupted.

At least in point of *right*.

3rd. Peaceable and Acquiesced in.

4th. Reasonable; *i. e., not unreasonable.*

Thus, even if there could be in Virginia (as there cannot) a valid custom or usage operating as an exception to the general rules of the common law, a custom or usage for a flour inspector, who by statute is to receive a specified compensation in money, to take to his own use the flour drawn from the barrel in the process of inspection, called the draft-flour, as an additional compensation or perquisite, would be bad, as unreasonable, unjust and contrary to law. (Delaplane v. Crenshaw, 15 Grat. 457, 465.)

5th. Certain.

Id certum est, quod certum reddi potest.

6th. Compulsory.

Customs though established by consent, must (when established) be *compulsory*; and not left to the option of every man whether he will respect them or not.

7th. Consistent with other Customs.

Customs must be consistent with each other. For if *both* are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs is absurd.

2^f. The Legality of Customs in Virginia.

Customs, as *local laws*, cannot exist in Virginia, because, when our ancestors came hither in 1607, they brought with them the *universal* common law, but no particular custom; and so every local custom now alleged to exist must have *originated since that period*, and therefore within the historic memory of man. (Harris v. Carson, 7 Leigh, 632; Mason v. Moyers, 2 Rob. 606; Delaplane v. Crenshaw, 15 Grat. 457, 470; Gross v.

Criss, 3 Grat. 250; Sellman v. Dunn, C. J. Taney, Cir. Ct. U. S. (Va. Quarterly Law Journal, July, 1856, p. 251); 3 Insts. 367.)

Let it be observed that the doctrine just stated does by no means exclude the effect of usage or custom in proving or modifying contracts, either express or implied. Contracts are generally made with more or less reference to existing custom or usage, and although, where the agreement is *in writing*, it may not be altered by proof of any such custom, save where the terms of the writing are ambiguous, yet having due regard to that rule of evidence, usage and custom are powerful auxiliaries to help us to the meaning of the parties. (Governor for, &c. v. Withers, 5 Grat. 24; Delaplanc v. Crenshaw, 15 Grat. 457; Ragland & Co. v. Butler, 18 Grat. 336-7; Sellman v. Dunn, Taney, C. J., U. S. Cir. Ct. (Va. Law Journal, July, 1856, p. 251).)

3^d. Contrast between Custom and Prescription.

Custom is a *local law*; prescription is a *source of private title to property*.

Both depend on *immemorial continuance*. In both, twenty years adverse, honest, uninterrupted continuance is proof of immemorial duration; that is, supposing immemorial continuance to be in the particular instance possible, as in Virginia, in the case of custom, *as a local law*, it is not.

Custom as a *local law* cannot exist in Virginia, for the reason stated on the preceding page. Prescription may, because there is no historic date for the introduction of *property*, as there is for the introduction of *law*. (Coalter v. Hunter, 4 Rand. 38; Nichols v. Aylor, 7 Leigh, 546; 3 Kent's Com. 441; 1 Lom. Dig. 673.)

3^e. Allowance of Particular Customs; w. c.

1^d. Customs (being in Derogation of the Common Law) must be Construed Strictly.

See 1 Bl. Com. 78-9.

2^d. Customs must submit to the King's Prerogative.

See 1 Bl. Com. 79.

3^e. Particular Laws;

Let us observe under this head, (1), What particular laws are admitted as part of the common law; (2), The several courts wherein they are used; and (3), The restraints upon their employment;

w. c.

1^d. What Particular Laws are admitted as Part of the *Lex non scripta*, or Common Law.

The particular laws which have been partially adopted as part of the common law, but with a number of cautious

restrictions, are the Roman or Civil law, and the Canon or Ecclesiastical law. (1 Bl. Com. 79 & seq.);

W. C.

1^o. The Roman or Civil Law.

See 1 Bl. Com. 80, 81.

W. C.

1^f. The Sources whence the Roman Law was compiled.

The sources whence the Roman law was compiled may be enumerated as follows; namely,

(1), The regal constitutions of their ancient kings;

(2), The XII. tables of the *Decemviri*;

(3), The laws enacted by the senate or people;

(4), The edicts of the Prætor;

(5), The *responsa prudentum*, or opinions of learned lawyers; and

(6), The imperial decrees, or constitutions of successive emperors.

See 1 Bl. Com. 80, 81.

2^f. The parts of which the Roman Law (the *Corpus Juris Civilis*) consists; Wherein of

1^g. The Institutes of Justinian.

The Institutes of Justinian is an elementary treatise for the use of beginners in four books compiled, by Tribonian, a great jurist of the time, under the order of the Emperor Justinian, about A. D. 533.

2^g. The Pandects, or Digest of Justinian.

The Pandects, or Digest of Justinian, is a *digest*, in fifty books, of the general doctrines of the Roman law, compiled with great labor and success, by Tribonian and his assistants, by order of Justinian, about A. D. 533. It contains the opinions of the most eminent jurists of the Roman world, digested with admirable system, upon all subjects connected with the municipal law of the empire.

Within less than a century after its completion, it disappeared, and was virtually lost to the world for fully 500 years, when a copy of it was casually found at *Amalfi*, in Italy, about A. D. 1130.

3^g. Code of Justinian.

The Code of Justinian is a new collection of imperial enactments, or constitutions, compiled by Tribonian, about A. D. 533, to supply deficiencies in his Digest.

4^g. Novels or New Constitutions.

The Novels (*Novellæ Constitutiones*) constitute a Supplement to the Code, containing new decrees of successive Emperors.

These four compose the *Corpus Juris Civilis*.

3^f. Popular Expositions of Roman or Civil Law; W. C.

1^g. Gibbon's History of the Decline and Fall, &c., ch. 44.

- 2^g. Hadley's Introduction to Roman Law.
- 3^g. Browne's Civil and Admiralty Law. Vol. I.
- 4^g. Taylor's Civil Law. p. 1 to 25.
- 5^g. Kent's Com.'s.—Vol. I., p. 515.
- 6^g. Cooper's Justinian's Institutes.

2^e. The Canon Law.

The Canon law embraces the whole body of Roman Ecclesiastical law. (1 Bl. Com. 92, & seq.) Let us observe, (1), Whence the Canon law was originally compiled; and (2), The depositaries of the Canon law;

W. C.

1^f. Whence the Canon Law was compiled originally.

The Canon law was compiled originally from opinions of ancient Latin Fathers,—the Decrees of General Councils of the church,—and the Decretal Epistles and Bulls of the Papal See.

2^f. Depositaries of the Canon Law; W. C.

- 1^g. The Concordia discordantium Canonum, or Decretum Gratiani, A. D. 1151 (3 books).
- 2^g. The Decretalia Gregonii Noni, A. D. 1230 (5 books).
- 3^g. The Sextus Decretalium, A. D. 1298 (1 book).
- 4^g. The Clementine Constitutions, A. D. 1317.
- 5^g. The Extravagantes Johannis, say A. D. 1320.
- 6^g. The Extravagantes Communes.

These six constitute the *Corpus Juris Canonici*.

7^g. Legatine Constitutions.

The Legatine Constitutions are the constitutions from time to time enacted in the English National Synods, *temp.* Henry III., A. D. 1220 to 1268, under Otho and Othobon, Legates from Gregory IX. and Clement IV.

8^g. Provincial Constitutions.

The Provincial Constitutions embrace the decrees of Provincial Synods held under divers Archbishops of Canterbury, from Henry III. to Henry VIII. By 25 Henry VIII., c. 19, it was enacted that there should be a review of the Canon law; and until it was made, that all canons, constitutions, ordinances, and synodals provincial, then made and not repugnant to the law of the land, should be in force. And on this statute (no such review having ever been made) now depends the authority of the Canon law in England. (1 Bl. Com. 83; Burn's Eccles. Law, Pref. xxvi.)

2^d. The several Species of Courts wherein (under restrictions) the Civil and Canon Laws are permitted to be used.

See 1 Bl. Com. 83, & seq.

W. C.

- 1^e. The Courts Christian, or Ecclesiastical Courts.
- 2^e. The Military Courts.

3^c. The Courts of Admiralty.

4^e. The Courts of the two Universities.

The Civil and Canon laws, one or both (especially the former), are used in Virginia in—

1. *Causes* Testamentary and Matrimonial:

2. The Military Courts,—that is, *Courts Martial*; and

3. The Courts of Admiralty.

3^d. The Restraints in the Employment of the Civil and Canon Laws; w. c.

1^e. The Courts of Common Law superintend and control the Courts which use the Civil and Canon Laws.

2^e. The Common Law reserves to itself the exposition of all Acts of Parliament which concern those Courts, or their jurisdiction.

3^e. An Appeal lies from these Courts to the Crown, in the last Resort.

2^a. The *Lex scripta*, or Statute Law.

Let us observe here, (1), How statutes are enacted; (2), The different kinds of statutes; (3), The rule of construction of statutes at common law; and (4), The rules for the construction of statutes prescribed in Virginia;

w. c.

1^b. How statutes are Enacted.

The mode of enacting statutes may be seen from 1 Bl. Com. 181, & seq.; Bac. Abr. Court of Parliament (E.); Id. Statute.

The student is invited to read attentively the passage of Blackstone here cited, from page 181 to 185.

The ordinary mode of passing laws in Congress (and the forms in the State legislatures are very similar) is briefly thus: One day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required; every bill must have three readings before it is passed, and these readings must be on different days; and no bill can be committed and amended until it has been twice read. In the House of Representatives, bills after being twice read, are committed to a committee of the whole house, when a chairman is appointed by the speaker to preside over the committee; the speaker leaves the chair, and occupies the place of an ordinary member. When a bill has passed one house it is transmitted to the other, and goes through a similar form, though in the Senate there is less formality, and bills are often committed to a select committee chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated; and if the two houses cannot agree, they appoint each a committee to confer on the subject. When a bill is engrossed, and has received the sanction of both houses, it is sent to the President for his approval. If he

approves the bill, he signs it. If he does not, he returns it within ten days (Sundays excepted), with his objections, to that house in which it originated, which enters the objections at large on its journal, and proceeds to reconsider it. If then two-thirds of that house agree to the bill, it is sent, with the objections, to the other house, and if approved by two-thirds of that house, it becomes a law. (Bac. Abr. Statute; Const. U. S. Art. I. § 7.)

2^b. The different Kinds of Statutes; w. c.

1^c. The different Kinds of Statutes, in respect to Subject-Matter; wherein of

1^d. Public Statutes.

Public statutes are such as regard, or affect materially, the whole or a great part of the community. They must be noticed by the courts *ex-officio*, without being *proved*. (1 St. Ev. 231; Bac. Abr. Stat. (F.); Pot. Dwar. Stat. 52, & seq.)

2^d. Private Statutes.

Private statutes are such as concern only a particular species, thing or person, or at least only a small part of the community. Of them the judges will not take notice *ex-officio*; but they must at common law be both pleaded and proved. (1 Bl Com. 86, and n. (21); Pot. Dwar. Stat. 52, & seq.); w. c.

1^e. Doctrine at Common Law as to Private Statutes.

Private statutes must at common law be both *pleaded* and *proved*. Such statutes in England are more frequently used than with us. (Pot. Dwar. Stat. 53, and n. (1).)

2^e. Doctrine by Statute, in Virginia, as to Private Statutes; w. c.

1^f. Pleading and Proof of Private Statutes.

In Virginia a private statute need not be *pleaded specially*, but must be *proved*. (V. C. 1873, ch. 172, § 1; V. C. 1887, ch. 164, § 5328; Legrand v. H. Sidney Coll., 5 Munf. 324; Somerville v. Wimbish, 7 Grat. 225.)

2^f. Mode of Proof of Private Statutes; w. c.

1^g. By Means of a Copy certified by the Officer charged with the Custody of the original Rolls of the Legislature.

In Virginia that officer is the *Clerk of the House of Delegates*. (V. C. 1873, ch. 14, § 14; V. C. 1887, ch. 15, § 207.)

2^g. By means of an *Examined Copy*,

Which a competent witness proves to have been compared with the original and found accurate. (1 St. Ev. 232; Pot. Dwar. Stat. 57.)

3^g. By Means of a Copy published by the Public Printer.

See V. C. 1873, ch. 15, § 8; V. C. 1887, ch. 15, § 207; Pot. Dwar. Stats. 60.

Copies of Acts of Congress, published *by authority*, are admitted in evidence in our courts (Taylor's Adm'r v. Bank of Alexandria, 5 Leigh, 471), and so Legislative Acts of the sister States have sometimes been permitted to be so proved (Thompson v. Musser, 1 Dall. 462; Biddis v. James, 6 Binn. 321; Cox v. Robinson, 2 Stew. & Port. 91; Raynham v. Canton, 3 Pick. 293), and so it is now provided by statute in Virginia (V. C. 1887, § 3330); but in the absence of such a statutory enactment, it is safer to comply with the Act of Congress (passed pursuant to Const. U. S. Art. IV. § 1), and have them authenticated under the *great seal of the State* (Rev. Stats. U. S. (2d ed.) § 905), which proves itself, *no matter by whom affixed*. (U. S. v. Amedy, 11 Wheat. 392; Craig v. Brown, 1 Pet. 352; Leland v. Wilkinson, 6 Pet. 317; Warner's Case, 2 Va. Cas. 95; Hunter v. Fulcher, 5 Rand. 126.)

2^c. The different Kinds of Statutes, in Respect to their Nature and Object.

See 1 Bl. Com. 86 & seq.;

W. C.

1^d. Declaratory Statutes.

Confirming and setting forth the old common law, when it has fallen into disuse, or become disputable. (1 Bl. Com. 86; Pot. Dwar. Stats. 55-'6.)

2^d. Remedial Statutes.

To supply defects, or abridge superfluities of the common law, arising out of the imperfections of human institutions, or out of a change of circumstances and times. (1 Bl. Com. 86; Pot. Dwar. Stats. 58.)

W. C.

1^e. Enlarging Statutes.

Enlarging the common law where too narrow and circumscribed. (1 Bl. Com. 86-'7.)

2^e Restraining Statutes.

Limiting and restraining the common law, where too lax and luxuriant. (1 Bl. Com. 87.)

3^b. The Rules to be observed with Regard to the Construction of Statutes, as prescribed by the Common Law;

See Bac. Abr. Statute, (1); Potter's Dwar. on Stats. 184 & seq.; Fox v. Com'th, 16 Grat. 9 & seq.;

W. C.

1^c. Advert to the three Points of the *Old Law*, the *Mischief* and the *Remedy*, and let the Construction tend to suppress the Mischief, and advance the Remedy.

See 1 Bl. Com. 87.

2^c. A Statute which treats of Things or Persons of *inferior Rank*, cannot, by *general Words*, be extended to those of a *superior*.

See 1 Bl. Com. 88.

- 3°. Penal Statutes must be Construed Strictly, but not so as to defeat the clear Intention.

See 1 Bl. Com. 88; Bac. Abr. Stat. (1.), 9.

- 4°. Remedial Statutes *v. g.* Statutes aimed against Frauds are to be construed liberally.

So far as a statute annuls a fraudulent or illegal transaction, it is *remedial*, and to be *liberally expounded*. So far as it acts upon the offender, by inflicting a penalty, it is *penal*, and to be *construed rigorously*. (1 Bl. Com. 88 '9; Bac. Abr. Stat. (1.), 8.)

All laws for suppressing gaming, lotteries, unchartered banks, and the circulation of bank-notes for less than \$5, shall be construed as *remedial*. (V. C. 1873, ch. 194, § 24; V. C. 87, ch. 187, § 3837; Shumate's Case, 15 Grat. 653.)

- 5°. One Part of a Statute must be construed by Another, *ut res magis valeat, quam pereat*.

See 1 Bl. Com. 89; Bac. Abr. Stat. (1.), 2, 3.

- 6°. In general the word "*May*" is to be construed "*Must*."

The word *may* in a statute is to be construed *must* in all cases, when the legislature means to impose a positive duty, and not merely to confer a discretionary power. (Minor v. Mechanic's Bank, 1 Pet. 64; Newburgh T. Pike Co. v. Miller, 5 Johns, ch. (N. Y.) 113; Backwell's Case, 1 Vernon 158 & n. (1); Rex v. Barlow, 2 Salk. 609; Rex v. Inhab. of Derby, Skin. 370; Drage v. Brand, 2 Wils. 377; Atto. Gen. v. Lock, 3 Atk. 166; Bac. Abr. Statute, (1.), 1.) Hence *may* is to be interpreted *must* wherever a statute directs the doing of a thing for the sake of *justice or of the public good*; or as it has been otherwise expressed, where the public interest and rights are concerned, and where the public or third persons have a claim *de jure*, that the power should be exercised. (Sedgw. Construct. of Stats. 375; Exp. Lester, 77 Va. 673.)

- 7°. A Saving *totally* repugnant to the Body of the Act is void. But they must be reconciled if possible.

See 1 Bl. Com. 89.

- 8°. Where the Common Law and a Statute differ, the Common Law gives Place to the Statute; and an old Statute gives Place to a new One. (1 Bl. Com. 89.)

But they must be reconciled if possible, as, if there be no *negative words* in the last law, they often may be. (Id. 90; Yerger's Case, 8 Wal. 105.)

So under the limited *written* Constitutions of America, a statute totally repugnant to the constitution *is void*. (Com'th v. Caton, 4 Call, (Va.) 520 (1782), which was the first case upon that point in the United States; the second case was in Rhode Island, decided in 1786, and the third in North Carolina, decided in 1787. (Doe v. d. Bayard v. Singleton, Martin (N. C.) 481.) Since then it has been

so held in numberless cases, amongst which are *Kemper v. Hawkins*, 1 Va. Cas. 20 (A. D. 1793); *Jackson v. Rose*, 2 Va. Cas. 34; *Hunter v. Martin*, 4 Munf. 1; *Crenshaw v. Slate Riv. Co.*, 6 Rand. 245; *Goddin v. Crump*, 8 Leigh, 120; *Clopton's Case*, 9 Leigh, 109; *Harrison's Justices v. Holland*, 3 Grat. 247; *Sharpe v. Robertson*, 5 Grat. 518; *Fletcher v. Peck*, 6 Cranch, 87; *Gibbons v. Ogden*, 9 Wheat. 1; *McCulloch v. Maryland*, 4 Wheat. 316; *Garland's Case*, 4 Wal. 333; *Cummings v. Missouri*, 4 Wal. 277; *Legal Tender Cases*, 12 Wal. 457; *Gunn v. Barry*, 15 Wal. 610; *Antoni v. Wright*, 22 Grat. 833; *Homestead Cases*, Id. 266.

See *Federalist*, No. LXXVIII. ; *Pot. Dwar. Stats.* 362-'3, & seq. ; 3 *Brough, Pol. Phil.* 338.)

- 9°. The motives of the Legislature, as fraudulent or otherwise, cannot be inquired into by the Judiciary. Such a power would place the former department, though emanating immediately from the people, in dependence on the latter. (*Cool. Const. Lim.* 186-7; *Sunbury & Erie R. R. Co. v. Cooper*, 33 Penn. St. 278; *People v. Draper*, 15 N. Y. 545; *Baltimore v. State*, 15 Md. 376; *Johnson v. Higgins*, 3 Met. (N. Y.) 566; *Wright v. Defrees*, 8 Ind. 302; *McCulloch v. State*, 11 Ind. 431; *State v. Hays*, 49 Md. 607; *Exp. McCordle*, 7 Wal. 514; *Wise v. Bigger*, 79 Va. 270.)

- 10°. If a Statute which repeals Another is itself afterwards repealed, the First is thereby revived.

See 1 Bl. Com. 90.

It is otherwise in Virginia, unless the latter repealing law be passed *during the same session*. (V. C. 1873, ch. 15, § 14; V. C. 1887, ch. 2, § 7.)

But if the *common law* be repealed by a statute which is itself afterwards repealed, the common law is thereby revived. (*Insur. Co. of the Valley v. Bailey's Adm'r*, 16 Grat. 384; *Booth's Case*, Id. 529.)

- 11°. Acts derogatory from the Power of subsequent Legislatures are of no Force.

See 1 Bl. Com. 90.

- 12°. Statutes that are Impossible to be Performed are of no Validity.

Hence consequences and constructions, contradictory to common reason and justice, are to be avoided as not within the legislative intent. (*Bonham's Case*, 8 Co. 118, a; 1 Bl. Com. 91.) But if the *words are clear*, there seems in England (where no limitation to the power of parliament exists) no power in the courts to defeat the intent. (1 Bl. Com. 91; *Pot. Dwar. Stat.* 76, & seq.)

Aliter in America, under the effect of our written, limited constitutions, and under the limitations which, with us, are understood to grow out of the essential nature of all free gov-

ements. (*Supra*, 8°. See *Loan Association v. Topeka*, 20 Wal. 662 & seq.)

It is doubtless a very illegitimate use of legislative power to appropriate private property for aught but *public use*; it would seem, however, that the legislature being the depository of the eminent domain of the State, is the proper judge of whether the use is *public* or not, and that its determination is conclusive and final, if not in *all cases whatsoever*, yet in all cases where it is not *incontestably clear* that the use contemplated was not, and could not, have been of a public character, but was, and must have been, *private*. To hold otherwise would appear to place the legislative department, even in respect to questions of *policy*, at the feet of the judiciary. (2 Kent's Com. (12th ed.), 340, and n. 1; Cooley's Const. Lim. 129, 538.)

It is to be lamented that the United States Supreme Court appears to regard the judiciary as clothed with power to review and control the authority and discretion of the legislature in the exercise of the right of eminent domain, in respect to the appropriation of private property. (*Loan Association v. Topeka*, 20 Wal. 655, 664 '5; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. LaGrange*, 113 U. S. 6, 7.)

13°. Construction of General Revisals of Codes.

In general revisals of codes, it is the established rule of construction that the old law is not intended to be altered, unless such intention plainly appears in the new code. (*Taylor v. Delancey*, 2 Cai. Cas. (N. Y.) 143; *Parramore v. Taylor*, 11 Grat. 242 '3; *Steamboat Wenonah v. Bragdon*, 21 Grat. 695.)

4^b. Rules to be observed with Regard to the Construction of Statutes, as *prescribed by Law in Virginia*, in order to diminish Verbiage in their Enactment.

See V. C. 1873, ch. 15, § 9; V. C. 1887, ch. 2, § 5, (cl. 1 to 16.)

W. C.

1°. Meaning of the Words "State" and "Township."

The word "State," applied to a part of the United States, shall include the District of Columbia and the several Territories, and so also shall the words "United States." And the word "township," in any statute prior to 3d Nov., 1874, shall mean "magisterial district." (Acts 1874-'5, p. 52, ch. 69; V. C. 1887, ch. 2, § 5, (cl. 1).)

Contra, independently of statute, as to the word *State* (*Hepburn v. Ellzey*, 2 Cr. 342).

2°. The Words "The Governor," and "Justice" or "Justices."

The words "the governor" shall be equivalent to "the executive power of this Commonwealth," or to "the person having the executive power." The word "justice," or "justices," shall be construed as if the words "of the peace"

followed them. The word "notary," or "notaries," as if followed by the word "public."

- 3°. Words purporting to give Authority to three or more persons shall be construed to give it to a majority, unless otherwise expressed.
- 4°. Meaning of the words "Personal Representative," in a Statute.

The words "personal representative" shall include an executor, an administrator, an administrator with a will annexed, an administrator *de bonis non*, with or without a will annexed, a sheriff, &c., *committee*, and every other curator or committee of a decedent's estate, for or against whom suits may be brought for causes of action accrued to or against the decedent.

- 5°. The words "Insane Person" shall include every One who is Idiot, Lunatic, *Non Compos*, or Deranged.
- 6°. Meaning of the Words "Oath" and "Sworn."

The word "oath" shall include an affirmation in all cases where an affirmation may be substituted for an oath; and in like cases the word "sworn" shall include the word "affirm."

- 7°. Meaning of the Words "Month" and "Year."

Unless otherwise expressed, the word "month" shall mean a *calendar* month, and the word "year" a *calendar* year. And the word "year" alone shall be equivalent to "year of our Lord."

Accordant, independently of statute, *Brewer v. Harris*, 5 Grat. 285; *Vandewall's Case*, 2 Va. Cas. 275; *Sheets v. Selden's Lessee*, 2 Wal. 189-'90.

- 8°. Where a Notice is required to be given, or Act done.

Where a statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding; but the day on which such notice is given, or such act is done, may be counted as part of the time.

This doctrine prevails independently of statute. (*Sheets v. Selden's Lessee*, 2 Wal. 190.)

- 9°. Where a Court or other Proceeding is directed to take Place.

Where a court or other proceeding is directed to take place on a particular *day of the month*, if that is Sunday, it shall take place the *next day*. And where a court or proceedings are to be adjourned from day to day, an adjournment from Saturday to Monday is legal.

- 10°. Meaning of the Words "Land" or "Lands," or "Real Estate," or "Personal Estate."

The word "land" or "lands," and the words "real estate," shall include lands, tenements, and hereditaments, and all

rights thereto and interests therein, other than a chattel-interest; and the words "personal estate" shall include chattels real, and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative.

- 11^c. Meaning of the Words "Written," "In Writing," or "Per Cent."

The words "written" or "in writing" shall include any representation of words, letters or figures, whether by printing or otherwise; and the words "*per cent.*" shall be equivalent to the words "*per centum.*"

- 12^c. Meaning of the Word "Seal."

The word "seal" in respect of *any corporation, court or public office*, shall include an impression of such official seal made upon the *paper alone*, as well as an impression made by means of a wafer, or of wax affixed thereto. And in respect to a *natural person*, the word "seal" shall include a *scroll affixed* by way of seal.

- 13^c. Singular Words may extend to several Persons or Things, and *Vice Versa*; Words *masculine* may extend to *Females*; and the Word "Person" may be applied to Bodies Politic and Corporate, as well as to Individuals.

- 14^c. The Words "Preceding" and "Following," referring to Sections or Statutes, shall mean *next preceding* and *next following*.

- 15^c. Ordinances of Cities, &c., not to be inconsistent with Constitution and Laws.

When the council or authorities of any city or town, or any corporation, board or number of persons, are authorized to make ordinances, by-laws, rules, regulations or orders, it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this State.

- 16^c. Meaning of the Words "City," "Town," "Council."

The word "*city*" shall mean a town of 5000 or more people, and having a Corporation or Hustings Court; and the word "*town*" shall mean an incorporated town containing a population of less than 5000. The word "*council*" shall include any body or bodies authorized to make ordinances for the government of a city or town.

- 17^c. The Construction and Effect of certain Words (i. e. "*commercial manures*," &c., "*soluble phosphoric acid*," &c.) descriptive of *Subjects of Inspection* in the Laws for the Inspection of Certain Commodities.

See V. C. 1887, ch. 84, §§ 1894, 1895.

- 18^c. Effect of a Law repealing a former Law.

A new law shall not be construed to repeal a former law, as to any offence committed against the former, nor as to any act done, or penalty incurred, or any right accrued, or

claim arising under the former law, or in any way to affect any such offence, act, penalty, right or claim, arising before the new law takes effect, save only that the *proceedings* thereafter had shall conform, as far as practicable, to the laws in force at the time of such proceedings; and if any penalty, &c., be *mitigated* by the new law, the provision, with the consent of the party affected, may be applied to any judgment subsequently pronounced. (V. C. 1873, ch. 15, § 13; V. C. 1887, ch. 2, § 6; *Campbell's Adm's v. Montgomery*, 1 Rob. 392; *Phillips' Case*, 19 Grat. 485; *Crawford v. Halstead & al.* 20 Grat. 220 & seq.)

3^a. The Law prevailing in Virginia; w. c.

1^b. The Law in Virginia previous to the Revolution of 1776; w. c.

1^c. The Common Law of England, *except Particular Customs*.

See *Harris v. Carson*, 7 Leigh, 632; *Mason v. Moyers*, 2 Rob. 606.

A pernicious, and as is believed, an unwarrantable doctrine has been propounded (1 Kent's Com. 473), that English statutes passed *before the emigration* of our ancestors, and applicable to our situation, and in amendment of the common law, constitute a part of the *common law of this country*. Others would embrace in the *common law of these States* all English statutes in aid of the common law *before the Revolution*. (1 Abb. U. S. Pr. 195.) See *contra*, *Levy v. McCartee*, 6 Pet. 110, as to the general doctrine. And in Virginia it is pointedly negatived by the ordinance of May, 1776, which adopts as the law of the Commonwealth, until altered by the legislature, "the common law of England, all statutes or acts of parliament made in aid of the common law, prior to 4 Jac. I., and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly now in force," &c. (9 Hen. Stat. 127; Stats. at Large, 199, 200.)

2^c. The general Statutes of England, made in Aid of the Common Law, and not local to England, prior to 4 Jac. I.

That being the date of the first charter of Virginia, the Virginian community was thereby severed from that of England; but they brought hither with them all the *general laws* of the mother country, but *no particular local customs*. (1 Bl. Com. 107; 1 Steph. Com. 98.)

3^c. The Statutes of England after 4 Jac. I., which *especially named* Virginia, or the Colonies generally.

See 1 Bl. Com. 108.

4^c. Acts passed by the Colonial Assembly.

See Hen. Stats. at Large, vols. 1 to 9.

2^b. The Law in Virginia since the Revolution; w. c.

1^c. The Laws enacted by direct Authority of the Commonwealth;

w. c.

1^d. The Common Law of England, so far as not repugnant to the Constitution, nor altered by the General Assembly.

See Ordinance of Convention of 1776, 9 Hen. Stats. 127; 13 Hen. Stats. 23; V. C. 1873, ch. 15, § 1; V. C. 1887, ch. 2, § 1; Findlay v. Smith & ux. 6 Munf. 148; Coleman v. Moody, 4 Hen. & Munf. 19.

2^d. Remedial and Judicial Writs, given by any act of Parliament, made in Aid of the Common Law, prior to the 4th Year of James I., of a general nature, not local to England.

See V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3.

3^d. Acts of Assembly, and State Constitution and Bill of Rights.

By Act of December 27, 1792, the General Assembly having express reference to the Ordinance of Convention of 1776, above referred to (*Supra*, 44, 45), adopting as part of the law of the Commonwealth all British statutes made in aid of the Common Law, and not local to England, prior to 4 Jac. I., declared that, having then specially enacted such of the said English statutes as appeared worthy of adoption, so much of the above-recited ordinance as relates to any statute or act of parliament is repealed; and that no such statute or act of parliament shall have any force or authority within this Commonwealth. (1 Stats. at Large, 200.)

2^c. The Laws of the United States.

The Constitution of the United States, and the laws and treaties made in pursuance thereof, are the *supreme law* of the land, anything in the constitution or laws of any State to the contrary notwithstanding. (U. S. Const., Art. VI., § 2); w. c.

1^d. Constitution of the United States.

2^d. Acts of Congress made in pursuance of the Constitution.

3^d. Treaties made under the Authority of the United States.

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE AUTHORITY, AND TO THE LAWS OF ENGLAND; AND ALSO OF THE UNITED STATES AND OF VIRGINIA.

IV. The Countries subject to the *Authority* and to the *Laws* of England; and also of the United States and of Virginia.

See 1 Bl. Com. 92 to 120;

w. c.

1^a. The various Countries *subject to the Authority* of England;

w. c.

1^b. England and Wales.

These, since 27 Hen. VIII., c. 26, have had an entire *communion of laws*, but they had a *diversity of courts* until 11 Geo. IV., and 1 Wm. IV., c. 70 (A. D. 1830), since which the Welsh judicature is entirely incorporated with that of England. (1 Bl. Com. 94-5; 3 Steph. Com. 455, n. (f).)

2^b. Scotland.

Upon the accession of James VI. of Scotland to the English throne (as James I. of England), A. D. 1602, there was an union of *crowns*, but they continued *distinct kingdoms* until 6 Anne (A. D. 1707), when they were united into one by agreement of the parliaments of both nations. But the municipal laws of Scotland still prevail there unless altered by parliament, whose acts always extend to Scotland, unless it be *expressly excepted*. (1 Bl. Com. 95 to 98; 1 Steph. Com. 87.)

3^b. Ireland.

Upon the conquest of Ireland by Henry II. (A. D. 1171-'2), the laws of England, including the common law, were imposed and their observance enforced (against the *Brehon* law, to which the people were attached), in 12 John (A. D. 1211); in 30 Henry III. (A. D. 1246); in 5 Edw. I. (A. D. 1277); and finally, in 40 Edw. III. (A. D. 1367). No statute of England, since 12 John, was in force in Ireland, unless *expressly named* (Ireland having a parliament of its own), until it was incorporated as an integral part of the British dominions (A. D. 1801), by 39 and 40 Geo. III., c. 67. Since the union all acts of parliament extend to Ireland, unless it be *expressly excepted*. (1 Bl. Com. 99 to 104; 1 Steph. Com. 88 to 95.)

4^b. Berwick upon Tweed.

Berwick was originally part of the kingdom of Scotland, from which it was conquered (A. D. 1296), by Edward I., who granted it a charter, and the town being afterwards ceded by Edward Baliol, King of Scotland (A. D. 1333), to Edward III., the latter granted further charters (A. D. 1337 and 1357), whereby he confirmed its privileges, and especially provided that it should be governed by its ancient *Scottish laws*. Its present constitution is by Statute 2 Jac. I., chap. 28 (A. D. 1605), which confirms and enlarges its privileges, making it a county of itself, that is, a county of a town corporate. It is bound, however, by all acts of parliament, *whether named or not*. (1 Bl. Com. 99; 1 Steph. Com. 87-'8; Rex v. Cowles, 2 Burr. 850 & seq.)

5^b. The Isle of Man.

The Isle of Man is a distinct territory from England, and not governed by its laws, nor bound by any act of Parliament *unless specially named*. It was formerly a subordinate feudatory kingdom, subject to the Kings of Norway, and at length, through various transfers, was granted by Henry VII. (A. D. 1492) to Sir John Stanley, and after sundry grants and forfeitures, it was conferred in 7 James I. (A. D. 1610)

on William, Earl of Derby, from whose family it passed (A. D. 1735) to the Duke of Atholl, and was finally purchased by the Crown, in 5 Geo. III. (A. D. 1763), and thereby its *jura regalia* were extinguished. (1 Bl. Com. 105-6; 1 Steph. Com. 96-7.)

- 6^b. Islands of Jersey, Guernsey, Sark, Alderney, &c., in the British Channel.

These islands were parcel of the Duchy of Normandy, and were united to the Crown of England by the first princes of the Norman line. They are governed by their own laws, collected in an ancient book entitled "*Le Grand Coutumier*," and are not bound by acts of parliament, *unless specially named*. An appeal lies from their courts to the King in council. (1 Bl. Com. 106; 1 Steph. Com. 97; Hale Hist. Com. Law, 147 (ch. vi.); Id. 266 (ch. ix.))

- 7^b. Isles of Wight, Portland, Thanet, &c.

These islands are comprised within some neighboring county, and are, to all intents and purposes, *parts of the realm of England*. (1 Bl. Com. 105; 1 Steph. Com. 95.)

- 8^b. Plantations and Colonies.

The plantations and colonies of England are not subject to acts of parliament, *unless particularly named*. (1 Bl. Com. 108; 1 Steph. Com. 99, 100.)

W. C.

- 1^c. Different Kinds of Plantations or Colonies, in Respect to the Mode of Acquisition; W. C.

- 1^d. Plantations or Colonies *settled by English Subjects*.

English settlers, when they emigrate from the mother-country to the colonies of England, carry with them the general laws of England, *e. g.*, of Inheritance, Marriage, Contracts, Personal Rights, &c., but not the constitutions of a more artificial character, *e. g.*, laws of police, revenue, maintenance of religion, &c., nor *local customs*. (1 Bl. Com. 107; 1 Steph. Com. 98.)

- 2^d. Colonies wrested by Conquest or Treaty from other Powers.

These retain their own laws until changed by the sovereign in council, or by parliament, or by such legislature as he or it shall provide; a principle, in modern times, applicable universally in all countries to newly-acquired territory. (1 Bl. Com. 107; 1 Steph. Com. 99; United States v. Percheman, 7 Pet. 87.)

- 2^c. The Different Kinds of Colonies and Plantations, in Respect of Interior Polity:

They are all modelled after the Government of England. (1 Bl. Com. 108 to 110; 1 Steph. Com. 101.)

W. C.

- 1^d. Provincial Governments.

Constituted by royal commission, or by act of parlia-

ment, with a governor appointed by the Crown, and a legislature usually consisting of a council appointed by royal authority, and a house of representatives elected by the people, with power to make laws not repugnant to those of England, subject to a *Veto-power* possessed by the Crown acting through the governor; *e. g.*, Virginia, from 1624 to 1776. (1 Bl. Com. 108; 1 Steph. Com. 101.)

2^d. Proprietary Governments.

Created by grants made by the Crown to individuals, in the nature of feudatory principalities, with subordinate powers of legislation, (commonly exercised as *supra* 1^d), but subject to the sovereignty of the mother country; *e. g.*, Maryland, prior to 1776. (1 Bl. Com. 108.)

3^d. Charter Governments.

In the nature of civil corporations, created by royal charter, with power to make laws for their interior regulation, not contrary to the laws of England, and with such rights and authority as the charter confers. They have commonly organized a government after the model of England; *e. g.*, Virginia until 1624; Massachusetts, &c. (1 Bl. Com. 109; 1 Steph. Com. 101-'2.)

- 9^b. Foreign Dominions belonging to the *Person* of the King; *e. g.*, Hanover formerly; none at present. Hanover was wholly unconnected with the laws of England, and in no wise under the control of the English Parliament; and since the accession of Queen Victoria, in consequence of the *Salique* law (excluding females), it has had a different sovereign; and in the German war of 1866, it was by conquest annexed to Prussia, of which it is now a province. (1 Bl. Com. 110; 1 Steph. Com. 106-'7; Bouv. Law Dict. v. *Salique*.)

10^b. Possessions in the East Indies.

These arose out of the acquisitions of the "East India Company," which was constituted, for *trading purposes alone*, by 6 Anne, c. 17 (A. D. 1708), out of two commercial corporations previously existing. After many mutations tending all in that direction (*viz.* by Stats. 13 Geo. III., c. 63 (A. D. 1773); 24 Geo. III., c. 25, and 26 Geo. III., c. 16, (A. D. 1784, 1786); 53 Geo. III., c. 155 (A. D. 1813); and 3 & 4 Wm. IV., c. 85, A. D. 1834), the local government of India was committed to a governor-general and a board of councillors, with power to make laws for all persons, British or native, throughout the territories, subject to the allowance of the board of directors in London, and subject also to the paramount authority of parliament. (1 Steph. Com. 104 and 106.) And at length, in consequence of the Indian revolt of 1857-'8, it was in 1858, enacted by 21 and 22 Vict. c. 106, that all territories in the possession or under the government of the East India Company, and all rights vested in the said Company in relation thereto, should become vested in Her Majesty, and be exer-

cised in her name, through the agency of a Secretary of State. (Broom. & Hadl. Com. 94.)

2^a. The Territory *immediately subject to the Laws of England*.

The territory *immediately subject to the laws of England* includes, (1), The high seas, beginning at low-water mark; and (2), England, Wales and Berwick;

W. C.

1^b. The High Seas, beginning at Low-water Mark.

These are subject to the jurisdiction of the *Admiralty Courts*, and not to that of the courts of the common law. Between high and low water, where the sea ebbs and flows, the common law and the Admiralty have *divisum imperium*, an alternate jurisdiction; one upon the water when it is full sea, the other upon the land when it is at ebb. (1 Bl. Com. 110; 1 Steph. Com. 108.)

2^b. England, Wales and Berwick.

The territory on land immediately subject to the laws of England, including England, Wales, and Berwick, is composed of, (1), Ecclesiastical divisions; and (2), Civil divisions;

W. C.

1^c. Ecclesiastical divisions of the Territory of England, &c.

See 1 Bl. Com. 111 to 113; 1 Steph. Com. 108 to 114;

W. C.

1^d. Provinces of Canterbury and York,—presided over each by an Archbishop.

The Archbishop of Canterbury is called the *Primate of all England*; the Archbishop of York the *Primate of England*.

2^d. Dioceses,—each presided over by a Bishop.

Twenty dioceses in the province of Canterbury, and six in that of York.

3^d. Archdeaconries,—each presided over by an Archdeacon.

Archdeaconries are sub-divisions of dioceses.

4^d. Rural Deaneries,—each presided over formerly by a Rural Dean.

Rural deaneries are sub-divisions of archdeaconries.

5^d. Parishes.

Parishes are sub-divisions of rural deaneries. They are the circuits of ground committed to one parson, vicar, or other minister.

2^c. Civil Divisions of the Territory of England, &c.

See 1 Bl. Com. 114 to 120; 1 Steph. Com. 114 to 124.

Their formation, or at least their organization, is ascribed to Alfred. They consist of, (1), Tithings, towns, vills or boroughs; (2), Hundreds; (3), Lathes, rapes, and trithings, or ridings; and (4), Counties;

W. C.

1^d. Tithings, Cities, Towns, Vills, Boroughs.

These terms appear to have about the same meaning.

The name *Tithing* is Saxon, and is so called because *ten* freeholders, with their families, compose one, each freeholder being surety for the rest. The head-man was called *Tithingman* or *Borsholder* (*Borough's-caller*); and originally each such division had a church, thus corresponding somewhat to *parishes*. (1 Bl. Com. 114-15; 1 Steph. Com. 114 to 116.)

W. C.

1^e. Cities.

Cities are large towns which are or have been the seat of a *Bishop's See*. They usually possess the apparatus of municipal government, with peculiar privileges, quite separate from the county in which they are situated. They are sometimes styled Counties Corporate.

2^e. Boroughs.

Boroughs are cities or towns which send *Burgesses* to *Parliament*.

3^e. Towns.

Towns, in modern times, are collections of dwellings, smaller than a city, with or without corporate privileges, or municipal government.

2^d. Hundreds.

Hundreds are composed of *ten Tithings*, whose chief officer is a high constable, or bailiff, and they were formerly provided with a Hundred-court for the trial of causes. In the northern counties, Hundreds are called *Wapen-takes*. The division seems to have been borrowed from Denmark, and to have been derived originally from the Germans. (1 Bl. Com. 115; 1 Steph. Com. 117.)

3^d. Lathes (in Kent), Rapes (in Sussex), and Trithings or *Ridings* (in Yorkshire).

These are intermediate divisions between tithings and counties, prevailing in a few counties. Trithings or Ridings subsist in modern times only in the county of York, where they are denominated the north, the east, and the west riding. (1 Bl. Com. 116; 1 Steph. Com. 118.)

4^d. Counties or Shires.

The word county comes from the French *count* (comes), or earl, the chief executive officer, the sheriff (*vice-comes*), being his deputy; the word *shire*, from Saxon *scir-an*, to divide, whence the acting executive was styled *scire-gerefa*, shire-reeve, or sheriff—*i. e.*, steward of the shire.

The division into counties or shires was originally intended for the convenient dispatch of *judicial business*, in local courts held before the sheriff, in conjunction, for a time, with the bishop. In modern times a similar use is made of the division, but the courts are held by judges of the courts at Westminster, who make periodical cir-

cauits for the purpose, or by county-justices in certain criminal and police cases, at *Quarter Sessions*, &c.

The division also subserves the ends of the *allotment of representation* in parliament, and of *taxation for local purposes* :

W. C.

1^o. Counties Ordinary.

Under the description of counties ordinary are ranged at present almost all, if not every one, of the counties of England and Wales.

2^o. Counties Palatine—Chester, Durham, and Lancaster.

Counties palatine are called so, *a palatio*, because the owners or chiefs thereof had *jura regalia*, the Earl of Chester and the Bishop of Durham, probably because they bordered upon the inimical countries of Wales and Scotland (on which account also there were formerly two other counties palatine—Pembrokeshire and Hexhamshire), and the Duke of Lancaster, perhaps because he was of the blood-royal. But none of these counties palatine now remain in the hands of a subject, Chester having been united to the Crown by Henry III., Durham by Stat. 6 and 7 Wm. IV., c. 19 (A. D. 1837), and Lancaster by Stat. 1 Henry VII. (A. D. 1485). (1 Bl. Com. 117 to 119; 1 Steph. Com. 120 to 123.)

3^o. Isle of Ely.

The Isle of Ely was never a county palatine (though sometimes erroneously so called), but was formerly a royal franchise, with *jura regalia*, vested in the Bishop of Ely, which, however, were transferred to the Crown by Stat. 6 and 7 Wm. IV., c. 87. (1 Bl. Com. 119; 1 Steph. Com. 123.)

4^o. Counties Corporate.

Counties corporate are certain cities and towns to which has been granted by the Crown the privilege of being governed by their own officers, and not by those of the county in which they are situated; *e. g.*, London, York, Bristol, &c. (1 Bl. Com. 120; 1 Steph. Com. 123-4.)

3^a. The Territory immediately subject to the Laws of the United States.

The territory immediately subject to the laws of the United States includes, (1), The high seas; and (2), The vast domain on land embraced within the limits of the United States;

W. C.

1^b. The High Seas.

The main or high seas are for some purposes part of the realm of the United States, and over them the Federal courts of admiralty exercise, in respect of vessels and citizens of the United States, a jurisdiction both civil and criminal. The main sea begins at *low-water* mark; but between the high-

water mark and the low-water mark, where the sea ebbs and flows, the common law, whether administered in the Federal or in the State courts, and the admiralty, have *divisum imperium*, an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is at ebb. (1 Bl. Com. 110; 4 Min. Insts. 232 & seq.) The term *high seas*, beginning at low-water, takes in the uninclosed waters of the ocean on the sea coast, outside of the *faucēs terræ*, and also the arms of the sea, bays and estuaries which are so wide that one standing on the one shore cannot with the naked eye fairly discern and attest what is done on the opposite shore. (1 Whart. Cr. Law (8th Ed.), § 269; 1 Bish. Cr. Law (6th Ed.), §§ 103, 105; U. S. v. Grush, 5 Mas. 290; U. S. v. Ross, 1 Gal. 624.)

By the Federal Constitution (Art. III., § ii. 1), the judicial power of the United States extends to "all cases of *admiralty and maritime jurisdiction*," and is thus understood to embrace, so far as *civil causes* are concerned, the cognizance of all *maritime contracts*; of all *torts* (that is, wrongs other than violations of contract), occurring on the high seas, or on any water in the United States navigable for vessels used in commerce, and communicating with the waters of other States or countries; of *prize-causes*; and of causes rising out of seizures upon *navigable waters*, under the *navigation and revenue laws* of the United States. (4 Min. Insts. 249-'50.) But so far as relates to *crimes*, the jurisdiction of the United States admiralty courts is, by a late statute, restricted to such as are committed on the high seas, or in any arm of the sea, or in any haven, creek, basin or bay, within the admiralty jurisdiction of the United States, and *out of the jurisdiction of any particular State*. (Rev. Stats. U. S. § 563, cl. 1; § 629, cl. 20; Id. § 5339, cl. 2; U. S. v. Bevens, 3 Wheat. 336; U. S. v. Furlong, 5 Wheat. 184; U. S. v. Holmes, 5 Wheat. 412; U. S. v. Marchant, 12 Wheat. 480; Pennsylvania v. Wheeling Bridge Co. 13 How, 518; Miss. & Mo. R. R. Co. v. Ward, 2 Black, 485; U. S. v. Grush, 5 Mas. 290.) The *civil* admiralty jurisdiction of the United States is thus, *in point of locality*, considerably more extensive than the corresponding *criminal* jurisdiction.

The territorial limits of the United States, viewed as one nation, are determined by the law of nations to extend as far seaward as is needful for the protection of its coasts and people; which is usually reckoned at one marine league, or something less than three and a half miles; that is, the effective range of ordinary cannon-shot from the shore, along all its coasts. (Vattel, B. I., § 289; Wheat. Internatl. Law, Pt. II., ch. IV., § 6.) Whether, having respect to recent improvements in guns, and the great increase in their range, this distance is to be extended, has not yet been determined.

(1 Bish. Cr. Law (6th Ed.), § 104.) But it must be observed that the term *coasts* includes all *islands* (but not *shoals*) within this territorial limit, and that the measurement outward is to be computed *from them*, whether they are inhabited or inhabitable or not, and whether they are composed of earth or of solid rock, for in either case they come within the reason of the rule. (Wheat. Internat. Law, Pt. II., ch. IV., § 6; 1 Bish. Cr. Law, § 104; *Soult v. L'Africaine*, Bee, 204; *Rex v. Forty-nine Casks of Brandy*, 3 Hag. Adm. 257, 280; *The Anna*, 5 Rob. Adm. 373, 385 c.)

2^b. The Domain on Land, embraced within the Limits of the United States.

The land-domain embraced within the limits of the United States is subject to the Constitution of the United States, and the laws and treaties made in pursuance thereof; but it will be remembered that the federal system applies only to the subjects plainly included within it, whilst all other subjects of governmental administration are reserved to the States respectively, or to the people; or, as it is expressed in Article X. of the Amendments to the Constitution, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, while the regulation of the mails, of the coinage of money, of the army and navy, of the introduction of imports, and the levying and collecting of duties thereon, and also of the imposition and collection of internal taxes, together with the arrangements for the Federal judiciary, with some other matters of general or national importance, are committed to the control of the Federal authorities; the laws which regulate marriage, the making of contracts and their construction, the enjoyment and disposition of property, the general doctrines of crimes and punishments, the rights which concern life and liberty, the general education of the people, and, in short, whatever most nearly relates to the business and interests of society in general, are enacted, construed and executed by the States.

4^a. The Territory immediately subject to the Laws of *Virginia*.

The territory immediately subject to the laws of Virginia includes all the land within the boundaries of the State, together with so much of the Chesapeake Bay, and the bays, havens, estuaries and rivers connected therewith as is within its limits, and also the islands, and the inlets and lagoons lying between the islands and peninsulas and the main land, on the eastern coast of the counties situated upon the ocean. The jurisdiction of the State, as to the ocean, seems to stop with the shore, that is, at low-water mark, reckoning the islands off the coast, however, as part of the shore; and where the jurisdiction of the State ends, that of the United

States, as before explained, begins, the latter jurisdiction being exclusive in respect of the marine league seaward. (V. C. 1873, ch. 1, § 1 & seq.; V. C. 1887, ch. 3, §§ 8, &c.)

The Convention-legislature which, on the 29th day of June, 1776, declared the independence of Virginia and at the same time ordained its constitution or form of government, by § 21 of that instrument, confirmed to the neighboring colonies of Maryland, Pennsylvania, and North and South Carolina, such parts of the territory of Virginia as were contained within the charters creating those colonies, and declared that the "*western and northern extent* of Virginia should in all other respects stand as fixed by the charter of King James I., in the year 1609, and by the public treaty of peace between the courts of Great Britain and France, in the year 1763," unless modified by subsequent act of the State legislature. (1 R. C. 1819, p. 37 ch. 4, § 21.)

It will be observed that nothing is said of the boundary on the *side of the ocean*, but it may be inferred that the design was to assume it as laid down in the same charter, which granted not only all the territory "all along the sea-coast," between certain limits, but "also all the islands lying within 100 miles along the coasts." (1 Hen. Stats. 88.) At all events, as an independent State, its jurisdiction would extend a marine league from the shore; and whilst, by the common law doctrine, no part of the sea beyond low-water mark was within the body of any county, the jurisdiction within the marine league would be exercised by the State's court of admiralty, which, in October 1776, the legislature proceeded to establish, declaring that it should "have cognizance of all causes," *except capital offences*, heretofore of admiralty jurisdiction in this country, and shall be governed in *their* proceedings and decisions by the regulations of the Continental Congress, acts of the General Assembly, English statutes prior to the fourth year of the reign of King James I., and the laws of Oleron, the Rhodian and Imperial laws, so far as the same have been heretofore observed in the English courts of admiralty, save in the instances hereafter provided for." (9 Hen. Stats. 202-'3.) And it had long before been enacted, in 1699 (3 Hen. Stats. 178), that "all treasons, *fellonyes*, *piracyes*, robberies, murders, or other *capitall* offences that shall be committed upon the high seas, or in any river, haven, creek or bay where the admirall hath jurisdiction, shall be enquired, tryed, *heard*, determined, judged, and execution awarded and done within this his majesty's collony and dominion in such form as if such offence had been committed in and *upon the land* of this his majesty's collony and dominion." And to that end the governor is empowered to issue a commission of *oyer and terminer*, directed to the judges of the admiralty, and such other substantial persons as he shall think fit to appoint, who

shall hear and determine, adjudge and punish such crimes as corresponding commissioners might in England, under the Stat. 28 Hen. VIII. c. 15. (3 Hen. Stats. 178.)

This statute of 1699 appears to have regulated trials for *capital* offences committed on the ocean within a marine league of the shore until the institution of the present Federal government in 1789; for the three several statutes providing for commissions of *oyer and terminer*, enacted respectively, Oct. 1776 (9 Hen. Stats. 172 and 218), and May 1777 (9 Hen. Stats. 306), can hardly be understood to include such crimes; nor the statute of October 1777, creating a general court, with jurisdiction to "hear and determine all treasons, murders, felonies, and other crimes and misdemeanors, which *shall be brought before them*" (9 Hen. Stats. 414); although it is so supposed by the court in Gaines' case, 2 Va. Cas. 178. The general court having been, in October 1777, clothed with power to hear and determine all offences of every grade, at the session of the General Assembly, in Oct. 1786, jurisdiction was conferred on it to try all treasons and other offences, except *piracies and felonies on the high seas*, committed by any citizen of this commonwealth, in any place *out of the jurisdiction of the courts of common law* in this commonwealth, and all felonies committed by citizen against citizen in any such place, *other than the high seas*, in the same manner as if the said offences had been committed *within the body of a county*. (12 Hen. Stats. 330; Gaines' Case, 2 Va. Cas. 180.)

December 22, 1788, an act was passed which established District Courts, and conferred upon them "full power to hear and determine all treasons, murders, felonies, and other crimes and misdemeanors *committed within their district*, and which shall be brought before them" according to law (12 Hen. Stats. 730); and the same statute provided that "if any criminals sent for trial to the general court shall not have been tried at their session in December 1788; or if any criminals so sent from the county court (it is supposed as an *examining court*, 12 Hen. Stat. 340 & seq.), or shall hereafter be sent for trial to the general court, it shall be lawful for the executive, upon application of the attorney general, to cause such criminals to be sent to the district from whence they came." (12 Hen. Stats. 759.)

And December 25, 1788, in consequence, as the statute recites, of the judicial power of the United States having been, by the Constitution then recently adopted, extended to all cases of "admiralty and maritime jurisdiction," the State court of admiralty was discontinued. (12 Hen. Stats. 769.)

There seems to be no doubt that the territory of Virginia embraced so much of the Chesapeake Bay, and the bays, havens, estuaries and rivers connected therewith, as is within the limits of the State, and also the islands, and the inlets and

lagoons lying between the islands and peninsulas, and the main land on the eastern coast of the counties bordering upon the ocean. That is understood to result from the effect of all three of the charters of Virginia granted by James I., in the fourth, seventh, and ninth years of his reign respectively, (1 Hen. Stats. 57, 80, 98,) but especially from the terms of the *second* charter, (7 Jac. I., May 23, 1609,) which granted "all the soils, grounds, *havens and ports, rivers, waters,* fishings, commodities, jurisdictions, royalties, privileges, franchises and *preheminences* within the said territories, and the precincts thereof whatsoever, and thereto and thereabouts, *both by sea and land,* being or in any sort belonging or appertaining." (1 Hen. Stats. 88.) And it is established that whatever territory, including as well navigable waters as lands, belonged to the several States before the Revolution of 1776, whereby they respectively became sovereign, continues still to belong to them, except so far as they may have granted it away, and subject also to the rights surrendered by the Constitution to the Federal government. (*Martin v. Waddell*, 16 Pet. 410; *Pollard v. Hagan*, 3 How. 228-9; *Den. v. Jersey Co.* 15 How. 432; *Smith v. Maryland*, 18 How. 74.)

But it is not so clear what courts are, and have been, charged with the function of judicial administration upon Chesapeake Bay, and the wider waters connected therewith. The open sea at common law, according to the better opinion, is not *within the body* of any county, nor subject to the cognizance of the common law courts, but to the admiralty only; but arms of the sea, as rivers, harbors, creeks, basins and bays so closely embraced by the land that a man standing on the one shore can, with the naked eye, reasonably discern objects and what is done on the opposite shore, are within county limits. And it is not material to this doctrine whether the shore is mainland or island. (1 Bish. Cr. Law (6th Ed.), § 146; 2 East. P. C. 805; *Rex v. Bruce, Rus. & Ry.* (1 Brit. Cr. Cas.) 243.) On this principle, Chesapeake Bay, and the wide estuaries of the James, York, Rappahannock and other rivers would not be within the body of any county, but subject to the jurisdiction of the admiral; and from the first settlement at Jamestown, 13th May, 1607 (1 Burk's Hist. Va. 97), to the year 1699, it appears to have been so, with no other modification than may have been perhaps wrought by Stat. 28 Hen. VIII. c. 15, providing for *commissioners* to be appointed to conduct trials for offences committed in any place where the admiral has or pretends to have authority or jurisdiction, in like manner as if the offence had been committed upon the land. But in 1699 was enacted a statute, already cited (*Ante*, p. 60), modelled after and closely resembling 28 Hen. VIII. c. 15, providing for similar *commissioners*, to be appointed by the governor, to hear and determine "all trea-

sons, felonies, piracies, robberies, murders or other *capital* offences that shall be committed upon the high seas, or in any river, haven, creek or bay, where the admiral hath jurisdiction, . . . in such form as if the offence had been committed upon the land." (3 Hen. Stats. 178.) And that statute is believed to have regulated trials for *capital* offences committed on Chesapeake Bay, and the wide waters connected with it, either until October, 1777 (when, according to Gaines' Case, 2 Va. Cas. 178, it was transferred to the general court, by act of October, 1777 (9 Hen. Stats. 414), or until October, 1786 (when, according to the dissenting opinion in Gaines' Case, which seems to be the most reasonable, it was vested in the same court, by act of October, 1786 (12 Hen. Stats. 330)). And under one or other of those acts jurisdiction over those waters continued to be exercised by that court until 1819, when, by the Revisal made in that year, an enactment was introduced (1 R. C. 1819, ch. 69, § 6, p. 229), which substantially is retained in the present Code, as follows, namely, "Where any river, water-course, or bay lies *between any counties* in this State, the courts for the counties *on each side*, respectively, shall have *concurrent jurisdiction* over so much thereof as is *opposite to said counties*. And the courts for counties lying on the *waters bounding the State* shall have jurisdiction, respectively, over such waters *opposite said counties*, so far as the *jurisdiction of this State extends*." (V. C. 1873, ch. 157, § 2; V. C. 1887, ch. 151, § 3110.)

A doctrine closely assimilated to this seems to prevail, even at common law, in England. Thus, in that country, if there are tide-waters between two shores, both subject to the British crown, the counties on either side extend over the waters, each to the *middle of the channel*, whereas with us the jurisdiction is concurrent from shore to shore. (1 Bish. Cr. L. § 149; Reg. v. Cunningham, Bell C. C. 72.)

It might be thought that, considering the extent of Chesapeake Bay, and according to the definition of the *high seas* (*Ante* p. 57-8), the bay could not be subject to the territorial jurisdiction of either the United States or Virginia; but the contrary has been long established, not only by the actual possession and enjoyment of more than two and a half centuries, but by the acknowledged doctrines of international law. Thus it is clear that, if the entrance to a gulf or bay, where it joins the ocean, does not exceed two marine leagues, or one league from each shore to the centre, the whole water, whatever its breadth further up, is a part of the country in which it lies. (1 Bish. Cr. L. § 105; Wheat. Internatl. Law (6th ed.), 248, 249, 252.) And even though the entrance be wider than two marine leagues, the doctrine is allowed, although it is not ascertained how much it may exceed that distance. The Chesapeake Bay is twelve miles across at the exit to the ocean, and

the Delaware Bay somewhat more, but both are certainly within the territorial limits of the United States, and the former, as we have seen, is subject to the jurisdiction of Virginia, as far as the northern boundary of the State, and therefore, as respects *crimes*, is not within the limits of the cognizance of the United States admiralty courts. (*Ante* p. 57-8; Rev. Stats. U. S. § 563, cl. 1; Id. § 629, cl. 20; Id. § 5339, cl. 2; U. S. v. Bevens, 3 Wheat. 336.)

It may be observed that the ordinary common law rule as to the bounds of counties on the sea, it is supposed, does not apply to our great *lakes*; so that over them the counties extend to the limits of the State, that is, of the United States. (1 Bish. Cr. L. § 149; *People v. Tyler*, 7 Mich. 161.)

THE OBJECTS OF THE COMMON AND STATUTE LAW.

BOOK THE FIRST.

OF THE RIGHTS WHICH RELATE TO THE PERSON.

The objects of the common and statute law, as may be gathered from the definition of municipal law, and its analysis, (*Ante* p. 24, 1^d), are to *define and secure rights, and to redress wrongs*, so that the whole subject, (omitting the consideration of crimes and punishments,) may be classified under the several heads of, I. RIGHTS WHICH CONCERN OR RELATE TO THE PERSON; II. RIGHTS WHICH CONCERN OR RELATE TO THINGS REAL; III. RIGHTS WHICH CONCERN OR RELATE TO THINGS PERSONAL; and IV. MODES OF SECURING RIGHTS AGAINST INVASION, AND OF OBTAINING REDRESS FOR WRONGS:

W. C.

I. THE RIGHTS WHICH CONCERN OR RELATE TO THE PERSON.

RIGHTS are correlative to DUTIES. They are said to be *perfect* when their existence in no wise depends on the judgment of another, *e. g.*, in case of a *debt*; and *imperfect* when their existence depends on circumstances to be determined by the discretion of the party who is alleged to owe them, *e. g.*, in case of *charity*. A *perfect* right may be enforced: an *imperfect* one cannot be.

We are to discuss, (1), The rights which concern or relate to the person, in respect to natural persons; and (2), In respect to artificial persons, or corporations;

W. C.

1st. Rights which concern or relate to the Person, in respect to *Natural Persons*.

Rights of this character are either, (1), Absolute rights; or (2), Relative rights;

W. C.

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

1^b. The Absolute Rights which relate to the Person, in respect to Natural Persons.

Absolute rights are such rights as are independent of the relations of men in society, and which belong to every one alike. They constitute the *liberties of the citizen*. (1 Bl. Com. 123 & seq.) We may discuss the subject under the heads of, (1), The nature of liberty; (2), The several sorts of absolute rights; and (3), The solemn declarations and guards of absolute rights;

W. C.

1^c. The Nature of Liberty.

The nature of liberty may be set forth under the heads of, (1), Natural liberty; (2), Civil liberty; and (3), Political liberty;

W. C.

1^d. Natural Liberty.

Natural liberty is the right of disposing of one's person and property at pleasure, so it be not to the prejudice of another. (1 Bl. Com. 126, n. (5); 2 Burlamaq. Nat. & Polit. Law, Pt. I., c. III., § xv.)

2^d. Civil Liberty.

Civil liberty is natural liberty so far restrained by human laws (and no farther), as is necessary and expedient for the public advantage. (1 Bl. Com. 125; Id. 126, n. (5).)

3^d. Political Liberty.

Political liberty is the security with which, from the Constitution and from the established government, the subjects enjoy civil liberty. (1 Bl. Com. 126, n. (5).)

2^c. The Several Sorts of Absolute Rights.

The several sorts of absolute rights include, (1), The right of personal security; (2), The right of personal liberty; (3), The right of private property; and (4), The right of freedom of conscience;

W. C.

1^d. The Right of Personal Security.

The right of personal security includes, (1), Security of life; (2), Security of limbs useful in fight, &c.; (3), Security of body; (4), Security of health; and (5), Security of reputation. (See 1 Bl. Com. 129 & seq.; 3 Bl. Com. 120, &c.; Synops. Crim. Law, 37 & seq.)

W. C.

1^e. Security of Life.

Security of life is guarded even in the womb, it being a *felony* to bring about abortion; and if the child be born

alive and die by reason of the injury, it is *murder*. (Synopsis. Crim. Law, 55; 1 Bl. Com. 129, 130, & n. (11).) An unborn child, though illegitimate, may take property, if sufficiently described, (*e. g.*, as the child of *such a woman*). (1 Bl. Com. 130, n. (13); 2 Lomb. Exors, 35.)

2°. Security of limbs, *useful in Fight*, for Defence or for Annoyance.

See 1 Bl. Com. 130 & seq.; 3 Bl. Com. 121.

W. C.

1^f. The Wilful Disabling of Limbs.

The wilful disabling of limbs useful in fight, constitutes the crime of *mayhem* at common law. (1 Bl. Com. 130; Synopsis. Crim. Law, 67; 4 Bl. Com. 205.)

2^f. Defence of Limbs.

The necessary defence of one's limbs will excuse even homicide. (1 Bl. Com. 130.)

3^f. Duress *per Minas*.

The most solemn acts and agreements are invalidated if extorted by a *well-grounded* apprehension of the loss or disabling of limbs, the threat of which, when accompanied by the power immediately to accomplish it, amounts to what is known as duress *per minas* (that is, by threats). (1 Bl. Com. 130-'31.)

4^f. Support for Life and Member is by Law provided for the Poor.

See 1 Bl. Com. 131; *Post*, p. 141; V. C. '87, ch. 38, §§ 876 & seq.

5^f. Continuance of Rights of Life and Member is determined only by Natural Death.

The common law recognizes two sorts of death, namely, (1), Civil death; and (2), Natural death.

W. C.

1^g. Civil Death.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them is considered as dead. (1 Bl. Com. 132.)

Let us note (1), The modes of civil death at common law; (2), Effect of civil death at common law; (3), Existing state of the law in England; and (4), Existing state of the law in Virginia.

W. C.

1^h. Modes of Civil Death at Common Law.

Civil death is brought about at common law in several ways.

W. C.

1ⁱ. Attainder of Treason or Felony.

See 1 Steph. Com. 132; 4 Bl. Com. 380.

2ⁱ. Banishment from, or Abjuration of the Realm.

See 1 Bl. Com. 132; *Id.* 133, n. (15); Bac. Abr. Bar. & F. (M.)

- 3^d. Entering into Religion, *i. e.* becoming a Monk professed.

Even in the times of popery in England the law of England took no cognizance of monkish profession in any foreign country, and, therefore, this disability is held to be abolished since the Reformation. (1 Bl. Com. 132; *Rex. v. Lady Portington*, 1 Salk. 162.)

- 2^h. Effect of Civil Death at Common Law.

The party is regarded as actually dead, his will is admitted to probate, or administration is granted, &c. But his rights as touching life and member remain unimpaired. (1 Bl. Com. 132.)

- 3^h. Existing State of the Law in England.

There can be no monkish profession in England since the Reformation (and of foreign profession no notice was ever taken); and abjuration of the realm, as incident to the right of sanctuary, was abolished by Stat. 21 Jac. I., c. 28. (1 Bl. Com. 133; 4 Bl. Com. 333.) It would seem, however, that abjuration might arise in other ways. (4 Bl. Com. 124; *Id.* 56.) And the books, since 21 Jac. I., seem to recognize it. (*Bogget v. Frier & al.*, 11 East 301; * 2 Co. Inst. 629.) It seems that banishment operates a civil death. (Bac. Abr. B. & F. (M).)

- 4^h. Existing State of the Law in Virginia.

Abjuration, banishment and monkish profession are unknown to the law of Virginia, and it is believed that there is no such thing with us as a *Civil Death*. (*Branch v. Bowman*, 2 Leigh, 170; *Platner v. Sherwood*, 6 Johns. (N. Y.) 127.)

A sentence to the penitentiary does not of *itself*, independently of statute, involve such a consequence. (1 Bl. Com. 133, n. (15); *Platner v. Sherwood*, 6 John, 127.) But it does lead in Virginia, by statute, to a commitment of the convict's estate to a *Committee*, to be managed very much as if he were dead (V. C. 1873, ch. 206, § 6 to 12; V. C. 1887, ch. 202 §§ 4115 & seq.); and such a conviction is also ground of divorce *a vinculo matrimonii*. (V. C. 1873, ch. 106, § 6; V. C. 1887, ch. 101, § 2257.)

If one once a resident of Virginia is absent therefrom for seven years successively, he is *presumed to be dead*, unless proved to have been alive within that time. (V. C. 1873, ch. 170, § 47; V. C. 1887, ch. 164, §§ 3373, 3374. Bac. Abr. Dower, &c. (C), 3; 1 Greenl.

* NOTE.—It was recognized in *Bogget v. Frier & al.*, merely by a plea averring that the plaintiff was a married woman, whose husband was a native-born citizen, and had not *divorced the woman*, &c., and yet that plaintiff was suing *alone* as a *feme sole*. A demurrer to the plea was overruled, but no stress was laid on the *abjuration*.

Evid. § 41.) But the law raises no presumption as to the precise time of his death. The burden of proving that the death occurred at any particular time within the seven years lies upon him whose right depends upon this fact. (Davie v. Briggs, 97 U. S. 628. Evans v. Stewart, 81 Va. 724.)

2^c. Natural Death; w. c.

1^h. Value set upon Life, as the Gift of the Creator.

Life is not to be destroyed by the person himself, or by any other, merely upon their own authority, but it may be forfeited for the breach of the laws of society, in *very grave* cases, for the preservation of society. (1 Bl. Com. 133-4; Do. 11, 12, 14; Grot. de Jure, &c., B. II., c. 20, §§ 12, 2.)

2^h. Protection to Life afforded by *Magna Charta*.

Magna Charta condemns and forbids the arbitrary killing or maiming of the subject, without express warrant of law. "*Nullus liber homo aliquo modo destruetur, nisi per legale judicium parium suorum aut per legem terræ.*" (1 Bl. Com. 133; 1 Rap. Eng. 290, B. viii.)

3^c. Security of Body.

In respect to menaces, assaults, beating and wounding. The same propositions are in the main true as in respect of security of limbs. (1 Bl. Com. 134; 3 Bl. Com. 120, &c.)

4^c. Security of Health.

In respect of practices which may annoy or injure it. (1 Bl. Com. 134; Synops. of Crim. Law, 178, &c.; 3 Bl. Com. 122.)

5^c. Security of Reputation.

In respect of acts of detraction or slander. (1 Bl. Com. 134; Synops. of Crim. Law, 161, and seq.; 3 Bl. Com. 123, & seq.)

2^d. The Right of Personal Liberty.

In discussing the right of personal liberty it is proposed to advert, (1), To the prohibition by the Great Charter, of imprisonment unwarranted by law; (2), The great importance of protecting the personal liberty of the subject; (3), The securities provided against the violation of personal liberty; (4), What confinement amounts to imprisonment; (5), Duress of imprisonment; (6), Requirements as to warrants of commitment; and (7), Involuntary exile. (1 Bl. Com. 134; 3 Bl. Com. 127, & seq.)

w. c.

1^o. Prohibition by the *Great Charter*, of Imprisonment Unwarranted by Law.

"*Nullus liber homo capiatur, vel imprisonetur, nisi per legale judicium parium suorum, vel per legem terræ.*" (4 Bl. Com. 349-50; 1 Rap. Eng. 290, B. viii.)

2^c. Great importance of Protecting the Personal Liberty of the Subject.

No engine of tyranny is so oppressive as that of irresponsible and capricious imprisonment, nor any so dangerous, because it is less likely to create seasonable alarm amongst the people, as was formerly witnessed in France. (1 Bl. Com. 135-36.)

It is a just and natural deduction from the provisions of *Magna Charta* that no man can, by the common law, be imprisoned, or his rights in any manner trespassed upon, even by express and direct order of the King himself, except by and in pursuance of *due process of law*. Thus Mr. Hallam enumerates amongst the five essential checks upon the royal authority which were acknowledged to exist in the time of Henry VII., that the officers and servants of the Crown who violated the personal liberty or other right of the subject, were liable to an action for damages, to be assessed by a jury, and sometimes to criminal process; nor could they plead any warrant or command in their justification, not even the direct order of the King. (1 Hal. Constl. Hist. Engl., B. I., ch. i. p. 2). And the same writer observes that in the dispute which arose out of the imprisonment of Sir Edmund Hampden and others, in 3 Car. I. (A. D. 1627-'8), "Ample proof was brought from the old law-books, that the King's command could not excuse an illegal act." "If the King command me," said one of the old judges under Henry VI., "to arrest a man, and I arrest him, he shall have an action of false imprisonment against me, though it were done in the King's presence." (1 Hal. Constl. Hist. Eng., B. I., ch. vii. p. 283.)

3^c. Securities provided against the Violation of Personal Liberty; w. c.

1^f. Securities provided in England.

The great security provided by the English law against the violation of personal liberty is the writ of *Habeas Corpus*—the great citizens' *Writ of Right*, secured by many statutes, but especially by 31 Car. II., enforced by 56 Geo. III., c. 100. (1 Bl. Com. 135; 1 Steph. Com. 135-6; 3 Bl. Com. 129 & seq.; 4 Min. Insts. 416 & seq.)

By means of this writ the *lawfulness* of the imprisonment alone is inquired into, not its *justice*. (*Ex-parte* Watkins, 3 Pet. 201; *Ex-parte* Kearney, 7 Wheat. 38; *Ex-parte* Ball, 2 Grat. 589, 592; *Armstrong v. Stone*, 9 Grat. 106.)

2^f. Securities provided in Virginia.

The securities against the violation of personal liberty, provided in Virginia, relate as well to the Federal as to

the State government, so that we may observe, (1), The constitutional guaranties to preserve the writ of *habeas corpus*; (2), The mode of prosecuting the writ of *habeas corpus* in Virginia State courts; (3), The mode of prosecuting that writ in the courts of the United States; and (4), The doctrine as to the suspension of the writ of *habeas corpus*.

1st. Constitutional Guaranties to preserve the Writ of *Habeas Corpus*.

The Constitution of the United States (Art. I., § ix., 2), and that of Virginia (Art. V., § 14, Const. 1869), provide as to the two governments respectively, that the "privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

2^d. The Mode of Prosecuting the Writ of *Habeas Corpus* in the State Courts of Virginia.

The mode of prosecuting the writ of *habeas corpus* in the State courts of Virginia may best be exhibited by noting, (1), The courts or judges which may by law grant the writ, and the terms on which it is granted; (2), To whom the writ is addressed, and on whom served; (3), Enforcement of prompt obedience; (4), The judgment upon the writ, the effect thereof, and mode of enforcement; (5), Writ of error to judgment; and (6), Instance of the application of a writ of *habeas corpus*.

1st. The Courts or Judges which may grant the Writ, and the Terms on which granted.

By statute the circuit, corporation and county courts, or judges thereof in vacation, are charged with the duty of granting the writ in proper cases. It is obtained upon petition, showing by *affidavit*, or other evidence, probable cause to believe that the party is detained *without lawful authority*, but the court or judge may previously require bond with surety, in reasonable penalty, that the prisoner will not escape by the way, and that he will pay the costs and charges awarded against him. (V. C. 1873, ch. 153, §§ 1, 3; V. C. 1887, ch. 146, §§ 3029, 3031.) And by the constitution the legislature may confer power (which the constitution does not of itself confer) on the court of appeals to grant the writ (Art. VI., § 2), which *seems* to have been done accordingly by the provision that the "said supreme court shall have jurisdiction in cases of *habeas corpus*, and of such appeals, writs of error and supersedeas, as may be legally docketed in or transferred to the said court." (V. C. 1873, ch. 156, § 54; V. C. 1887, ch. 150, § 3087; *Barnett v. Meredith*,

Judge, 10 Grat. 652, 655-'6; Page v. Clifton, Judge, 30 Grat. 417; Milliner v. Harrison, 32 Grat. 426; Peters v. The Auditor, 33 Grat. 368.)

But it must be observed, that the State courts have no authority to award a writ of *habeas corpus* so as to obstruct the exercise of the powers of the United States government. The marshal, or other person having a prisoner in custody under color of the authority of the United States, should make return to such a writ issued by a State court or judge, that the prisoner is held by authority of the United States, without producing his body. (Ableman v. Booth, 21 How. 506, 523; Tarble's Case, 13 Wal. 397, 406.)

And on the other hand, the United States courts and judges have no power to award the writ, unless the party is alleged to be imprisoned by authority, real or pretended, of the United States, or in contravention of the Federal constitution, laws or treaties. In all other cases of alleged illegal imprisonment, application must be made to the State courts or judges. (4 Min. Insts. 424-'5.)

And it should be observed that, in general, the remedy for mere errors in the proceedings of courts of *competent* jurisdiction, is by writ of error or appeal, and not by *habeas corpus*; but where the court has no jurisdiction, or the statute under which the proceeding has taken place is unconstitutional, the proceeding is void, and a writ of *habeas corpus* is proper to liberate the sufferer from confinement. (*Ex parte Rollins*, 80 Va. 314.)

2^h. To Whom the Writ is addressed, and on Whom served.

Addressed to and served on the person who detains the party, or has him in immediate custody, and it is made returnable as soon as may be, before the same or some other court or judge. (V. C. 1873, ch. 153, §§ 2, 4; V. C. 1887, ch. 146, §§ 3030, 3032.)

3^h. Enforcement of Prompt Obedience.

Three days after service of the writ, or if the prisoner has to be brought more than twenty miles, one day more for every twenty miles of such further distance is allowed; and a failure within that time to produce him, with a statement of the cause of the detention, before the court or judge, is punished by a forfeiture of \$300 to the petitioner. And the court or judge may proceed as courts are wont to do, to enforce obedience to the writ, to compel the attendance of witnesses, and to punish contempts. (V. C. 1873, ch. 153, §§ 5, 9; V. C. 1887, ch. 146, §§ 3033, 3037.)

4^b. The Judgment, the Effect thereof, and the Mode of Enforcement.

The court or judge, upon the return, and upon any other evidence (including the affidavits of witnesses, taken on reasonable notice), shall either discharge or remand the prisoner, or admit him to bail, as may be proper, and adjudge the costs, including that of transportation, to be paid as shall seem right. The facts, at the instance of either party, shall be recorded, and the record, if the proceeding is in vacation, shall be signed by the judge, and certified to the clerk of the circuit, county or corporation court for the county or corporation in which the judgment is rendered, as part of its records. The judgment is conclusive unless reversed (save that the petitioner may bring the same matter in question in an action for false imprisonment), and it is considered and enforced, even though rendered by the judge in vacation, as if it were a judgment of the court amongst whose records it is entered. (V. C. 1873, ch. 153, §§ 6, 7, 8, 9, 10; V. C. 1887, ch. 146, §§ 3039, 3040.)

5^b. Writ of Error to Judgment.

A writ of error lies as in any other case; and in the discretion of the governor, or of the president of the court, the court of appeals may be convened specially to consider the case. (V. C. 1873, ch. 153, §§ 11, 12; V. C. 1887, ch. 146, §§ 3037-3040.)

6^b. Instances of Application of Writ of *Habeas Corpus*.

See *Ex parte* Pool & als., 2 Va. Cas. 276; *McClintic v. Lockridge*, 11 Leigh, 253; *Armstrong v. Stone & ux*, 9 Grat. 102; *Elvira's Case*, 16 Grat. 561; *Leftwitch's Case*, 20 Grat. 716; *Jones' Case*, *Id.* 848; *U. States v. Cottingham*, 1 Rob. 615; *U. States v. Blakeney*, 3 Grat. 405; *U. States v. Lipscomb*, 4 Grat. 41; *Cooley's Const'al Lim'ns*, 339, &c.

3^g. Mode of Prosecuting the Writ of *Habeas Corpus* in the Courts of the United States; w. c.

1^h. The Courts and Judges whence the Writ may be obtained.

The writ of *habeas corpus* may be obtained from the supreme court and the circuit and district courts of the United States, and from the judges of said courts; but from the supreme court only when in the exercise of its *appellate* jurisdiction, except in cases affecting foreign ministers or consuls, or where a State is a party. (*In re* Metzger, 5 How. 176; *In re* Kaine, 14 How. 103; *Ex parte* Hung Hang, 108 U. S., 552; *Ex parte* Virginia, 100 U. S. 339; *Ex parte* Siebold, *Id.* 371; 1 Bright Dig. 301 '2; 1 U. S. Stats. 81, § 14;

4 U. S. Stats. 634, § 7; 5 U. S. Stats. 539, § 1; 14 U. S. Stats. 385-'6, § 1; 15 U. S. Stats. 44; Rev. Stats. U. S. § 751 & seq.; *Exp. Yerger*, 8 Wal. 97-'8, 105; *McCardle's Case*, 6 Wal. 324-'5; S. C. 7 Wal. 515; *Exp. Lange*, 18 Wal. 166.)

2^b. Instances of the Application of the Writ of *Habeas Corpus* in the United States Courts.

See *Ex parte Bollman*, 4 Cr. 100; *Ex parte Watkins*, 3 Pet. 193; S. C. 7 Pet. 568; *Ex parte Metzger*, 5 How. 176; *Ex parte Kaine*, 14 How. 103; *Ex parte Dorr*, 3 How. 103; *Ex parte Randolph*, 2 Brock. 488; *Ableman v. Booth*, 21 How. 506;* *Ex parte Milligan*, 4 Wal. 3; *Ex parte Yerger*, 8 Wal. 97-'8; *Ex parte Lang*, 18 Wal. 166.

4^g. Doctrine as to Suspension of the Writ of *Habeas Corpus*.

The suspension of the writ of *habeas corpus* is by the constitution of the United States allowed only when, in cases of rebellion or invasion, the public safety may require it, which, it would seem, is to be judged of *exclusively* by the legislature. (U. S. Const., Art. I., § ix. 2; 2 Stor. Const. § 1342; 1 Tuck. Bl. App'x, 292; Va. Const. 1869, Art. V., § 14.)

4^e. What Confinement amounts to imprisonment.

The confinement of the person in any wise amounts to imprisonment; *e. g.*, keeping one against his will in a private house, forcibly detaining him in the street, etc. (1 Bl. Com. 136.)

5^e. Duress of Imprisonment.

Duress of imprisonment avoids the most solemn acts and agreements thereby extorted, if the imprisonment be illegal; or if it be illegally perverted. (1 Bl. Com. 136-137; *Cadaval v. Collins*, 4 Ad. & El. (31 E. C. L.) 858.)

6^e. Requirements as to Warrants of Commitment.

Warrants of commitment to prison should be in writing, under the hand and seal, or at least under the *hand* of the officer committing, and should name the party, if his name be known, and express the cause of commitment; and if this last be omitted, the jailor is not bound to detain the prisoner. (1 Bl. Com. 137; *Synops. Crim. Law*, 215.)

7^e. Involuntary Exile.

Sending a subject out of the country, without his own

* NOTE.—The case of *Ableman v. Booth*, 21 How. 506, demonstrates with great force that a *habeas corpus* awarded by a State judge or a court is of no effect within the limits of the sovereignty assigned by the Constitution to the United States; that is, where the imprisonment is under color of the authority of the United States. The marshal, or other person having the prisoner in custody under the authority of the United States, should make a return to such a writ awarded by a State judge or court, making known the authority by which he holds him, but ought not to obey the process, (p. 523; *S. P. Tarble's Case*, 13 Wal. 396, 406, &c.)

consent, is violative of personal liberty, and prohibited by the Great Charter, even though under the pretext of an honorable office, as that of ambassador; but it is provided for in certain cases of crime by statute in England. (1 Bl. Com. 137, & n. (18); 4 Do. 371, 401; 2 Br. & Hall, Com. (Am. ed.), 422.)

3^d. The Right of Private Property.

See 1 Bl. Com. 138 & seq.

W. C.

1^o. The Origin of Property.

The notion of property is founded in the law of nature, *i. e.*, of God, but is liable to be qualified and restricted, according to the exigencies of society, by human law. (1 Bl. Com. 138; Do. 2 & seq.; Grot. *De Jur. Bell. & Pac.* B. II., c. I., § II., 4, 5; Puffend. B. IV., § VI.; Mackintosh's Essays, 36.)

2^o. Protection afforded to the Right of Property by the *Great Charter*.

The Great Charter declares (ch. xlv.) that no freeman shall be disseised or divested of his freehold, or of his liberties or free customs, but by the judgment of his peers, or by the law of the land. (1 Bl. Com. 138 '9; 1 Rap. Eng. B. VIII., p. 290.)

3^o. Private property is not to be taken for Public Uses without just Compensation.

See 1 Bl. Com. 139, & n. (19); U. S. Const. Amendments, Art. V.; Va. Const. 1869, Art. V., § 14.

4^o. No taxes are to be imposed, save by Consent of the People, or their Representatives.

See 1 Bl. Com. 140; Va. Const. 1869, Art. I. (Bill of Rights), § 8; Id. Art. X., §§ 10, 11, 1.

4^d The Right of Freedom of Conscience.

The idea of *toleration* of diversities of religious belief, but with a marked preference accorded by law to a certain form of faith, had, for a hundred years prior to our revolution, been familiar to the English mind in the mother country, and in the colonies. Justly regarding true religion as the most important interest of society, it was long accepted as an axiom that the interposition and protection of government were indispensable to preserve and disseminate it. When the Protestant Reformation had for England broken the bonds of Rome, and established the right of individual judgment in the things which belong to God, the State was constrained to *tolerate* differences of opinion; but the idea still remained unshaken that the direct support and aid of government was required in order to maintain the purity of religious belief, and to propagate the doctrines of the true faith amongst the people. The total severance of religion from the State, in the interest of true religion itself,

and perfect freedom of conscience, as the most effectual way of promoting sincere piety before God, were ideas not known to the common law, but solemnly promulgated by the Bill of Rights of Virginia, in 1776, and more emphatically by our Legislature in October, 1785, being one of the acts of which Mr. Jefferson was the author, reported by the Commission of Revisal in 1779. (12 Hen. Stats. 84; 1 Jeff. Mem. 36-'7, 40; 4 Min. Insts. 11.)

3^c. The Solemn Declarations, and Guards of Absolute Rights; w. c.

1^d. The Solemn Declarations, and Guards of Absolute Rights in England; w. c.

1^e. Solemn Declarations of Absolute Rights in England.

All of them being *parliamentary* declarations only, are repealable by parliament, although to do so would probably lead to a revolution. (1 Bl. Com. 127-'8.) They include, (1), *Magna Charta*; (2), Petition of right; (3), *Habeas Corpus act*; (4), Bill of rights; and (5), Act of settlement;

w. c.

1^f. *Magna Charta*, and its various Confirmations.

Magna Charta was extorted from John by the Barons, A. D. 1215, at Runnymede, near Windsor. (2 Roger of Wendover's Chron. 309; 1 Rapin's Eng. 285, B. VIII.) It was confirmed by Henry III., during his minority, particularly by Stat. 9 Hen. III. (A. D. 1225), and afterwards by a great number of other statutes, no fewer, according to Lord Coke, than thirty-two. (1 Bl. Com. 128; 1 Eng. Stats. at Large, 1.)

The following is the famous 29th chapter (Article xlv. of the Cottonian MS., as printed by Rapin), which is the foundation of English and American liberty:

"*Nullus liber capiatur, vel imprisonetur, aut disseisidatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus, rectum vel justitiam.*" (1 Rap. Eng. 290, & n. (a), Book VIII.; 4 Bl. Com. 424, n. (3); 1 Eng. Stats. at Large, 7.)

And it is not out of place to observe in this connection that the Committee of Revisal of 1779, whose work was adopted by the General Assembly in 1785, proposed an almost literal transcript of this chapter of the great charter, or chapter LVII. of their code, as follows: "*Be it enacted by the General Assembly, that no freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled,*

or any otherwise destroyed; nor shall the commonwealth pass upon him, nor condemn him, but by lawful judgment of his peers, or by the laws of the land. Justice or right shall not be sold, denied, or deferred to any man." (12 Hen. Stats. 186.)

And this declaration was reiterated in the same language in the revisal of 1819. (1 R. C. 1819, p. 595.)

2^d. Petition of Right, 3 Car. I. c. 1.

See 2 Rap. Eng. 270, B. XIX.; 1 Bl. Com. 128; 1 Hal. Const. Hist. of Eng. 288, 285 & seq.; 4 Min. Insts. 407 & seq.; 3 Eng. Stats. at Large, 123.

The petition of right, which was no more than a statute, although a very important one, declares that no tax, tallage, aid, gift, benevolence, or such like charge, shall be levied *without consent of parliament*;

That no person shall be deprived of liberty, property or life, but by the lawful judgment of his peers, or by the law of the land;

That neither the command of the King, nor of the Privy Council, shall be a sufficient warrant for imprisonment, *without legal cause shown*, nor any answer to the writ of *habeas corpus*;

That soldiers shall not be billeted upon the people;

That no man shall be adjudged of life or limb by any summary course, as by martial law, or otherwise, nor by virtue of any royal commission, but only according to the laws of the realm;

That no exemption, by merely *royal authority*, shall be allowed from the punishments denounced against offenders by the laws of the realm.

3^d. *Habeas Corpus* Act, 31 Car. II., c. 2.

See 1 Bl. Com. 128; 3 Do. 136; 3 Hal. Const. Hist. Eng. & seq.

The *habeas corpus* act requires the Lord Chancellor, or any of the twelve (now fifteen) judges in vacation, under *heavy penalties*, and the court of chancery, and the courts of Westminster in term, to grant the writ of *habeas corpus* immediately, upon complaint of illegal imprisonment, and to discharge any person confined without due warrant of law, and for lawful cause. (3 Bl. Com. 136-7; Bac. Abr. Hab. Corp. (B); 4 Min. Insts. 412 & seq.)

4^d. Bill of Rights, 1 Wm. & M., Stat. 2, c. 2.

The Bill of Rights of England is the declaration delivered by the Lords and Commons to the Prince and Princess of Orange, Feb. 13, 1688, and afterwards enacted in Parliament, when they had become king and queen, setting forth a summary of the most important popular rights and claiming them as the "ancient and undoubted

rights and liberties" of the people of England. (2 Rap. Eng. 794. B. XXIV.; 1 Bl. Com. 128; 3 Hal. Const. Hist. of Eng. 77.)

5^f. Act of Settlement, 12 & 13 Wm. III., c. 2.

The Act of Settlement (enacted when Mary, the wife of William of Orange, had already died without issue, and it was probable that her sister Anne, afterwards queen, would leave none), limits the crown to the Princess Sophia of Brunswick (granddaughter of James I.), "and the heirs of her body, *being Protestants*," and re-asserts the same "ancient and undoubted rights and liberties," together with some new provisions. (1 Bl. Com. 128; Id. 216; 2 Steph. Com. 489-'90; 3 Hal. Const. Hist. 134.)

2^e. The Guards for the Absolute Rights provided in England.

See 1 Bl. Com. 141 & seq.; 2 Steph. Com. 490 & seq.; w. c.

1^f. The Constitution, Powers and Privileges of Parliament.

See 1 Bl. Com. 141; Id. 146 & seq.; 2 Steph. Com. 490; Id. 347 & seq.

2^f. The Limitation of the King's Prerogative, by Bounds certain and notorious.

See 1 Bl. Com. 141; Id. 237 and seq.; 2 Steph. Com. 494 & seq.

3^f. The free and uncontrolled Dispensation of the Law in the ordinary Courts of Justice.

The emphatic words of *Magna Charta*, spoken in the person of the king, who in judgment of law (says Sir Edw. Coke), is ever present, and repeating them in all his courts, are these: "*Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*" (1 Bl. Com. 141-'2; 2 Steph. Com. 490 & seq.)

4^f. The right of petitioning the King, or either House of Parliament, for Redress.

See 1 Bl. Com. 143; 2 Steph. Com. 493.

5^f. The Right of having Arms for Defence.

See 1 Bl. Com. 143-'4.

2^d. The solemn Declarations and Guards of Absolute Rights in Virginia.

These declarations and safeguards are not, as in England, merely such as the ordinary legislature provides, and which therefore it may at pleasure dispense with; but they are declarations and safeguards provided by the *constitution*, or organic law, which has received the solemn and direct sanction of the people themselves, in their highest sovereign capacity, and which is a *law to the legislature*, all whose acts transcending it are void. The difference, although it has proved less important than had been fondly hoped, is not to be depised, and is of great value,

so far as the observance of the constitution is secured by the structure of the government, and the equilibrium of its departments; they may be enumerated as they are designed to declare and protect the several absolute rights, namely, (1), The rights of personal security and personal liberty; (2), Private property; and (3), Freedom of conscience;

W. C.

1^c. The Safeguards in Virginia, of the Rights of *Personal Security*, and *Personal Liberty*.

See Cooley's Const. Lim., 256 and seq., 295 & seq.

W. C.

1^d. Safeguards against Encroachments *by the State Government*; W. C.

1^e. Prohibition of *Ex Post Facto* Laws.

See Const. U. S., Art. I., § x. 1; Va. Const. 1869, Art. V. § 14; V. C. 1887, p. 39; Fletcher v. Peck, 6 Cr. 87; Cummings v. Missouri, 4 Wal. 277; *Exp.* Garland, 4 Wal. 333, 374; 2 Stor. Const. § 1373; Gut's Case, 9 Wal. 35; *Ante*, p. 26.

2^e. Prohibition of *Bills of Attainder*.

A bill of attainder is an *act of the legislature* whereby one is convicted and attainted of treason, felony, or other high crimes.

See Const. U. S., Art. I., § x. 1; Va. Const. 1869, Art. V., § 14; V. C. 1887, p. 39; 2 Stor. Const. § 1344; Id. § 1373; Drehman v. Stifle, 8 Wal. 601.

3^e. Suspension of Writ of *Habeas Corpus* prohibited, unless when, in cases of Invasion or Rebellion, the Public Safety may require it.

See Va. Const. 1869, Art. V., § 14; V. C. 1887, p. 39.

4^e. Prohibition of *General Warrants*, to search *unnamed Places*, or to arrest *unnamed* Persons.

See Va. Const. 1869, Art. I. (Bill of Rights), § 12; V. C. 1887, p. 33.

5^e. Prohibition of excessive Bail, excessive Fines, and of cruel and unusual Punishments.

See Va. Const. 1869, Art. I. (Bill of Rights), § 11; V. C. 1887, p. 33.

6^e. In Criminal Prosecutions, the Right is secured to demand the Cause and Nature of the Accusation, to be confronted with the Accusers and Witnesses, and to call for Evidence in One's Favor.

See Va. Const. 1869, Art. I. (Bill of Rights), § 10; V. C. 1887, p. 33.

7^e. Trial secured by an impartial Jury of the Vicinage, whose unanimous Consent is required to convict.

See Va. Const. 1869, Art. I. (Bill of Rights), § 10; V. C. 1887, p. 33.

8^g. Self-Crimination not to be compelled.

See Va. Const. 1869, Art. I. (Bill of Rights), § 10; V. C. 1887, p. 33.

9^g. Slavery and involuntary Servitude (except for Crime) is abolished, and prohibited forever.

See Const. U. S. Amendment XIII.; Va. Const. 1869, Art. I. (Bill of Rights), § 19; V. C. 1887, p. 34.

10^g. No State is to deprive any Person of Life, Liberty, or Property without due Process of Law, nor to deny to any Person within its Jurisdiction equal Protection.

See Const. U. S. Amendments, Art. XIV., § 1.

2^f. Safeguards against Encroachments on Rights of Personal Security, and Personal Liberty, *by the Federal Government*; w. c.

1^s. Prohibition of *Ex Post Facto* Laws.

See Const. U. S., Art. I., § ix. 3; Fletcher v. Peck, 6 Cr. 87; Calder v. Bull, 3 Dall. 386; Cummings v. Missouri, 4 Wal. 277; *Ex parte* Garland, 4 Wal. 333; 2 Stor. Const., § 1345; Id. § 1873.

2^s. Prohibition of Bills of Attainder.

See Const. U. S. Art. I., § ix., 3; 4 Bl. Com. 259; 2 Stor. Const. § 1344.

3^s. Suspension of the Writ of *Habeas Corpus* prohibited, unless when, in case of Invasion or Rebellion, the Public Safety may require it.

See Const. U. S. Art. I., § ix., 2; 2 Stor. Const. §§ 1338 & seq.

4^s. Prohibition of *General Warrants*, to search unnamed Places, or to arrest unnamed Persons; and also the Quartering of Soldiers in Private Houses.

See Const. U. S. Amendm't IV.; Id. Art. III.; 2 Stor. Const. §§ 1900 & seq.

5^g. Prohibition of excessive Bail, excessive Fines, and of cruel and unusual Punishments.

See Const. U. S. Amendm't VIII.; 2 Stor. Const. §§ 1903-4.

6^g. Prosecutions for capital, or otherwise infamous Crimes, to be only on Presentment or Indictment of a Grand Jury, except in Cases arising in the Land or Naval Forces, or in the Militia, when in actual Service in Time of War or public Danger.

See Const. U. S. Amendm't V.; 2 Stor. Const., §§ 1784 & seq.; *Ex parte* Milligan, 4 Wal. 3.

7^g. No One for the same Offence to be put twice in Jeopardy of Life or Limb.

See Const. U. S. Amendm't V.; 2 Stor. Const. § 1787.

8^g. Self-Crimination not to be compelled.

See Const. U. S. Amendm't V.; 2 Stor. Const. § 1788.

9th. None to be deprived of Life, Liberty, or Property without due Process of Law.

See Const. U. S. Amend't V.; 2 Stor. Const. §§ 1788-9.

10th. Accused to enjoy the Right to a speedy, and public Trial, by an impartial Jury of the State and District wherein the Crime was committed.

See Const. U. S. Amend't VI.; 2 Stor. Const. § 1791; Gut's case, 9 Wal. 37.

11th. Accused to be informed of the Nature and Cause of the Accusation; to be confronted with the Witnesses against him; to have compulsory Process for Witnesses in his favor; and to have Counsel.

See Const. U. S. Amend't VI.; 2 Stor. Const. §§ 1792 & seq.

2nd. The Safeguards in Virginia of the Right of *Private Property*; W. C.

1st. Safeguards against Encroachments *by the State Government*; W. C.

1st. Prohibition of the Taking of Private Property for *Public Uses*, without just Compensation.

See Va. Const. 1869, Art. V., § 14; V. C. 1887, p. 39; 2 Stor. Const. § 1790; Crenshaw v. Slate Riv. Co., 6 Rand. 245; Jas. Riv. & Kan. Co. v. Turner, 9 Leigh, 313; Jas. Riv. & Kan. Co. v. Thompson & als. 3 Grat. 270; Pumpelly v. Gr. Bay Co., 13 Wal. 166; Loan Assoc'n v. Topeka, 20 Wal. 655; Parkersburg v. Brown, 16 Otto. (106 U. S.), 500, 501; Cole v. La. Grange, 113, U. S. 6; Cooley's Const. Lim. 351 & seq; Id. 532 & seq. 538, & n. 2, 539 and seq.; People v. Smith, 21 N. York, 597; Varick v. Smith, 5 Pai. (N. Y.) 159; Beekman v. S. S. R. R. Co. 3 Pai. 45; S. C. 22 Am. Dec. 679; Ibid. 686 & seq., elaborate and lucid note of the editor.

To take private property for *private uses*, is not within *this* prohibition, but where *no public benefit will result*, such appropriation of the property of one person to another's private use is contrary to the fundamental principles of society, and is therefore void. (Loan Assoc. v. Topeka, 20 Wal. 662.)

2nd. Prohibition of Laws impairing the Obligation of Contracts.

See Const. U. S. Art. I., § x. 1; Va. Const. 1869, Art. V., § 14; V. C. 1887, p. 39; Sturges v. Crowninshield, 4 Wheat. 122, 197; Bronson v. Kinzie & als. 1 How. 311; McCracken v. Hayward, 2 How. 608; Von Hoffman v. City of Quincy, 4 Wal. 548; Curran v. Arkansas, 15 How. 319; Taylor v. Stearns & als. 18 Grat. 244, 262, 272; Quackenbush v. Danks, 1 Denio. (N. Y.) 128; S. C. 3 Denio, 594; State v. Carew, 13 Richards. Law, (S. C.)

506; 2 Stor. Const. § 1374 & seq.; *White v. Hart*, 13 Wal. 646; *Bank of Old Dominion v. McVeigh*, 20 Grat. 457; Homestead cases, 22 Grat. 288; *Antoni v. Wright*, 22 Grat. 841 & seq.; *Gunn v. Barry*, 15 Wal. 622; *Wise v. Rogers*, 24 Grat. 169; *Roberts v. Cocke*, 28 Grat. 218 & seq.; *Cecil v. Deyerle*, 28 Grat. 783; *Kent v. Kent*, 28 Grat. 843; *Clark v. Tyler*, 30 Grat. 134; *Hartman v. Greenhow*, 102 U. S. 672; *Antoni v. Greenhow*, 107 U. S. 769; *Poindexter v. Greenhow*, 114, U. S. 270; *Royall v. Virginia*, 106, U. S. 578.

- 3^g. Reservation of Jury-trial in Controversies respecting Property, and Suits between Man and Man.

See Va. Const. 1869, Art. I. (Bill of Rights), § 13; V. C. 1887, p. 33.

- 4^g. Taxation to be only by Consent of the People, or their Representatives.

See Va. Const. Art. I. (Bill of Rights), § 8; V. C. 1887, p. 33.

- 5^g. Taxation to be equal and uniform, and *ad Valorem*.

See Va. Const. 1869, Art. X., §§ 1 to 6; V. C. 1887, p. 46.

- 6^g. State debt prohibited to be Contracted, (except in a few Cases; *e. g.*, public Defence, etc.,) whether State be Principal or Surety.

See Va. Const. 1869, Art. X., §§ 7, 12, 13 to 15; V. C. 1887, pp. 46, 47.

- 7^g. Prohibition of the Suspension of Laws, save by the Legislature.

See Va. Const. 1869, Art. I. (Bill of Rights), § 9; V. C. 1887, p. 33.

- 8^g. Money to be Paid only in Pursuance of Appropriations by Law.

No money to be paid out of the State treasury save in pursuance of appropriations made by law; and all acts of appropriation to be determined by *ayes* and *noes* recorded, and only by a majority of all the members *elected* to each house. (See Va. Const. 1869, Art. X., §§ 10, 11; V. C. 1887, p. 47.)

- 9^g. Prohibition of Duty on Imports or Exports, etc.

See Const. U. S. Art. I., § x., 2; 1 Stor. Const. §§ 1016 & seq.

- 2^f. Safeguards against Encroachments on Private Property by the Federal Government; *w. c.*

- 1^g. Prohibition of the taking of Private Property for *Public Uses*, without just compensation.

See Const. U. S., Amendment V.; 2 Stor. Const. § 1790; 2 Kent's Com. 275-'6; 1 Tuck. Bl. Appx. 305-306; *Loan Assoc. v. Topeka*, 20 Wal. 655, 662.

- 2^g. Reservation of Jury-trial in Suits at Common Law, where the Value exceeds \$20.

See Const. U. S., Amendment VII. ; 2 Stor. Const. 11 1769 & seq.

- 3^g. *Direct Taxation* (*i. e.*, of Lands and Persons), to be apportioned amongst the States, according to Population ; *Indirect* to be uniform.

See Const. U. S., Art. I., § ii. 3 ; Id. § viii. 1 ; 1 Stor. Const. §§ 954 & seq. ; Id. §§ 630 & seq. ; Id. §§ 951, &c. ; *Veazie Bank v. Fenno*, 8 Wal. 533.

- 4^g. Prohibition of Duty on Exports.

See Const. U. S. Art. I., § ix., 5 ; 1 Stor. Const. §§ 1013 & seq.

- 5^g. Prohibition of Preference of Ports of one State over those of another.

See Const. U. S. Art. I., § ix. 6.

- 3^e. The Safeguards in Virginia of the Right of Freedom of Conscience ; w. c.

- 1^f. Safeguards against Encroachments *by the State Government* ; w. c.

- 1^g. Declaration that all Men are equally entitled to the free Exercise of Religion, according to the Dictates of Conscience.

See Va. Const. 1869, Art. I. (Bill of Rights), § 18 ; V. C. 1887, p. 34.

- 2^g. Prohibition of any Restraint in Respect of Religious Worship, or Belief, or Support of Ministry, or of Religious Test, etc. (Va. Const. 1869, Art. V., § 14.)

- 2^f. Safeguards against Encroachments *by the Federal Government* ; w. c.

Congress is to make no law respecting an establishment of religion, or prohibiting the free exercise thereof. (Const. U. S., Amendment I. ; Cooley's Const. Lim. 467 & seq.)

- 4^e. The Constitutional Provisions intended to secure all these Rights ; w. c.

- 1^f. Against Encroachments *by the State Government* ; w. c.

- 1^g. Freedom of the Press secured, and also of Speech.

See Va. Const. Art. I. (Bill of Rights), § 14.

- 2^g. Declaration that equal Civil and Political Rights and Public Privileges belong to all Citizens of the State.

The terms of the declaration are that "*no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*" (Va. Const. 1869, Art. I. (Bill of Rights), § 20 ; Const. U. S. Amendments, Art. XIV., § 1 ; *Strander v. W. Va.* 10 Otto (100 U. S.), 303 ; *Virginia v. Rives*, Id. 313 ; *Ex parte Virginia*, Id. 339.)

3^d. Declaration touching a Militia and Standing Armies.
That a militia is the natural and safe defence of a free State; that standing armies in time of peace are dangerous to liberty, and that in all cases the military should be subordinate to the civil power. (Va. Const. 1869, Art. I. (Bill of Rights), § 15.)

2^d. Constitutional Provisions to secure all the Absolute Rights against Encroachments *by the Federal Government*: W. C.

1st. Freedom of the Press secured, and also of Speech.

See Const. U. S. Amendments, Art. I.; Cooley's Const. Lim. 414 & seq.

2^d. Right peaceably to assemble and petition Government for a Redress of Grievances, secured.

See Const. U. S. Amendments, Art. I.

3^d. Right to keep and bear Arms not to be infringed.

See Const. U. S. Amendments, Art. II.; Cooley's Const. Lim. 350.

2^b. Relative Rights which concern the Person, in Respect to Natural Persons.

Relative rights, with their correspondent duties, are those which concern or relate to the person, and belong to persons, as they are *members of society*, and stand in various relations to each other, either (1), Public; or (2), Private. (1 Bl. Com. 145);

W. C.

1^c. The Public Relations, and the Rights and Correspondent Duties belonging thereto.

We are to discuss under this head, (1), The rights which concern persons in the relation of *magistrates*; and (2), The rights which concern persons in the relation of *people*;

W. C.

1^d. The Relation of Magistrates, and the Rights and Correspondent Duties belonging thereto;

Magistrates are either, (1), Supreme; or (2), Subordinate; and the doctrines touching the rights and correspondent duties growing out of the relation are to be disposed accordingly. (1 Bl. Com. 146 & seq.)

W. C.

1^e. Supreme Magistrates.

The supreme magistracy in England consists of, (1), The supreme legislature, Parliament; and (2), The supreme executive, or King. As to the judiciary, that is treated by Blackstone as an emanation from, and a branch of, the executive department;

W. C.

CHAPTER II.

OF THE PARLIAMENT.

1st. The Legislature in England, or Parliament.

We may explore what is most necessary to be known touching the parliament of England, or rather, as it now is, of Great Britain and Ireland, by adverting to, (1), The original and antiquity of parliament; (2), The manner of the summons and assembling of parliament; (3), The constituent parts of the parliament; (4), The laws and customs of parliament; (5), The mode of proceeding in parliament; and (6), The mode of dissolution of parliament. (1 Bl. Com. 146 & seq.; Bac. Abr. Court of Parliament; Id. Statute.)

W. C.

1st. The Original and Antiquity of Parliament.

A general council has been held immemorially in England, under the several names of *nichel-synode*, or great synod, *nichel-gemote*, or great meeting, *wittena-gemote*, or meeting of wise men, *commune concilium*, *curia magna*, *assisa generalis*, and since the Conquest, *parliament*, or assembly for conference. (1 Bl. Com. 147 & seq.; Bac. Abr. Court of Parliament (A); 1 Hal. Const. Hist. of Eng. 2 & seq.; 1 Stubbs' Const. Hist. 566.)

2nd. The Manner of the Summons and Assembling of Parliament.

Summoned by the *King's writ*, issuing out of chancery, and addressed to each lord of parliament, commanding his attendance; and to every sheriff of every county, for the election of knights, citizens and burgesses, within their respective counties. (1 Bl. Com. 150; Bac. Abr. Court of Parliament (C).)

The Convention parliaments, which in 1660 restored Charles II., and in 1688 disposed of the crown and kingdom to William and Mary, are justified by the *peculiar necessities* of those occasions. (1 Bl. Com. 151-2; 2 Hal. Const. Hist. 225, 238; 3 Do. 70 & seq.)

At the return of the writ, the parliament does not begin but in the presence of the King, either in person or by representative, empowered by *letters-patent*, under the great seal, if the king be out of the realm, or by *commission* under the great seal, if he be within it. (Bac. Abr. Court of Parliament (C).)

3rd. The Constituent Parts of the Parliament.

The constituent parts of the parliament are, (1), The king or queen; (2), The lords, spiritual and temporal; and (3), The commons. Each part has a *negative*, or necessary voice

in making all laws. (1 Bl. Com. 153 & seq.; Bac. Abr. Court of Parliament (C).)

W. C.

1^h. The King or Queen reigning.

See 1 Bl. Com. 153 & seq.

2^h. The Lords Spiritual, and the Lords Temporal.

They seem to have been originally designed as distinct *estates*, and are so named in acts of parliament, but in practice they intermix in debate and in votes, and a majority of the whole determines the action of the assembly. (1 Bl. Com. 156.)

W. C.

1ⁱ. What Lords Spiritual are Peers of Parliament.

The archbishops of Canterbury and York, respectively, one Irish archbishop, and twenty-four English bishops, and three Irish bishops, the Irish prelates sitting by rotation. (1 Steph. Com. 358; 1 Bl. Com. 155, n. (8); 1 Broom. & H. Com. 129, n. (e).)*

2ⁱ. What Temporal Lords are Peers of Parliament.

All the peers of England, by whatever title of nobility distinguished, dukes, marquises, earls, viscounts, or barons; sixteen peers chosen for one parliament, who represent the Scottish nobility; and twenty-eight Irish peers chosen for life. (1 Bl. Com. 157; Id. 97; 2 Steph. Com. 359-'60.)

3ⁱ. The peculiar Privileges of the Lords, besides their *Judicial* Capacity.

See 1 Bl. Com. 167-'8; Steph. Com. 373 & seq.

W. C.

1^k. To hunt in the King's Forests, severally, going and returning.

See 1 Bl. Com. 167.

2^k. To be attended in their own Body, by the Judges and the Law-Officers of the Crown. *ad tractandum, et consilium impendendum*, though not *ad consentiendum*.

See 1 Bl. Com. 168; 2 Steph. Com. 373-'4.

3^k. To make each another Lord of Parliament his *Proxy*, to vote for him in his Absence.

Originally this privilege was by license from the Crown, which the king has sometimes refused; but now it is such a mere form that a license is *presumed*. (1 Bl. Com. 168, n. (30) & (31); 2 Steph. Com. 374.)

4^k. To enter each a Protest, with his Reasons, on the Journals, against any Vote from which he dissents.

See 1 Bl. Com. 168, & n. (32); 2 Steph. Com. 374.

5^k. That Bills affecting the Rights of the Peerage shall originate in the House of Lords, and shall suffer no Changes in the Commons.

See 1 Bl. Com. 168.

* NOTE.—The recent dis-establishment of the Irish Church doubtless deprives it of representation in Parliament.

6^k. That the sixteen Representative Peers of Scotland, and the twenty-eight Representative Peers of Ireland, shall be chosen by the nobility of those countries respectively, the Scots for one parliament, the Irish for life.

See 1 Bl. Com. 169; Id. 97; 2 Steph. Com. 375.

3^h. The Commons, or Representatives of the People.

Let us observe in this connection. (1), Who compose the Commons house of parliament; (2), the Election of members of parliament; (3), The peculiar privileges of the Commons. (1 Bl. Com. 158 & seq.; Id. 169 & seq.; 2 Steph. Com. 362 & seq.; Id. 375 & seq.)

W. C.

1ⁱ. Who compose the Commons House of Parliament.

Representatives chosen by the people; those from the counties (elected by the proprietors of lands, etc.), being styled *Knights of Shires*; those from cities and boroughs, *Citizens and Burgesses*; and those from the two universities, simply *Representatives*. (1 Bl. Com. 159; 2 Steph. Com. 362-3.)

2ⁱ. Elections of Representatives in Parliament.

Herein consists the exercise of the democratical part of the constitution of England, whereby the requisite honesty of intention towards the body-politic is supposed to be blended with the required wisdom, knowledge, and capacity for deliberation. (1 Bl. Com. 170-71.) We will take notice of, (1), The qualifications of the electors; (2), of the elected; and (3), Writs of election and modes of proceeding therein;

W. C.

1^k. The Qualifications of the Electors, and the Incapacities which Disqualify.

The object is to exclude such persons as, from their *dependent position*, are esteemed to have no will of their own; such as have proved by their ill-conduct their unfitness to exercise so important a trust; and such as want the requisite discretion and understanding to exercise it;

W. C.

1^l. Qualifications of Electors; w. c.

1^m. Qualifications of Electors of *Knights of Shires*;

W. C.

1ⁿ. The *Estate* in Respect of which they may Vote.

Freeholds, and certain leaseholds, of a prescribed value and duration. (2 Steph. Com. 380; 2 Wm. IV., c. 45.)

2ⁿ. Registration.

The voter must have been *duly registered*, which is required to be done annually, by the overseers of parishes. (2 Steph. Com. 381-2.)

2^m. Qualifications of Electors of *Citizens and Burgesses*; W. C.

1ⁿ. The *Estate*, etc., in Respect of which they may vote.

It is necessary for the most part to be a "Burgess or freeman," or "Freeman and liveryman," or "Freeholder or burgage-tenant," with various qualifications. (2 Steph. Com. 284 & seq.; 2 Wm. IV., c. 45.)

2ⁿ. Registration.

As in the counties. (2 Steph. Com. 388.)

3^m. Qualifications of Electors of Representatives of the *two Universities*, and of *that of Dublin*.

The representation of the two universities was only permitted regularly, *temp. Jac. I.*; and that of Dublin since the union with Ireland. (1 Bl. Com. 174; 2 Steph. 384; Id. 393.)

2^l. Incapacities and Disqualifications of Electors.

See 2 Steph. Com. 389.

2^k. Qualifications of the Elected.

The qualifications of the elected are determined in part by the law and custom of parliament, declared by the House of Commons, and in part by certain statutes. (1 Bl. Com. 175, &c.; 2 Steph. Com. 390 & seq.)

W. C.

1^l. Qualifications in Respect to Citizenship, Age, and Understanding.

Alien-born, minors, idiots, and mad-men, are disqualified. (2 Steph. Com. 390.)

2^l. Qualifications in Respect to Previous Conduct and Character.

Persons attainted of treason or felony, outlawed on criminal prosecution, guilty of bribery or treating at elections (for that time and place), and declared bankrupt (for the next twelve months, etc.), are disqualified. (2 Steph. Com. 390; 1 Bl. Com. 175.)

3^l. Qualifications in Respect to the Occupancy of some other Office or Post (ministerial or judicial), or some Emolument from the Crown.

Peers (of *England*), judges, clergymen, sheriffs, mayors, and bailiffs (within their respective jurisdictions); occupants of any office under the Crown; contractors and pensioners, are disqualified. (2 Steph. Com. 392; 1 Bl. Com. 175 '6.)

4^l. Qualifications in Respect of *Estate*; W. C.

1^m. Qualifications for Knights of Shires.

Real estate, etc., to the clear *annual* value of £600, etc. (2 Steph. Com. 392; 1 Bl. Com. 176.)

2^m. Qualifications for Citizens or Burgesses.

Real estate, etc., to the clear annual value of £300, etc. (2 Steph. Com. 393; 1 Bl. Com. 176.)

3^m. Qualifications for Members for the Universities of Oxford and Cambridge, and of Trinity College, Dublin.

No estate required. (2 Steph. Com. 393.)

5^l. Special Disqualifications.

A disqualification may arise for *that* parliament, by vote of House of Commons, and *for ever* by statute. (2 Steph. Com. 393; 1 Bl. Com. 176, and n. (25).)

The exclusion of lawyers by ordinance of *House of Lords* (6 Hen. IV.), was unconstitutional. The parliament is branded with the name of *parliamentum indoctum*, or the lack-learning parliament, and Lord Coke says, that "there was never a good law made thereat." (1 Bl. Com. 176; 4 Min. Insts. 48.)

3^k. Writs of Election, and Modes of Proceeding therein.

As soon as the parliament is summoned, the lord chancellor (or if the vacancy happen during the sitting of parliament, the speaker, by order of the house, etc.), sends his warrant to the clerk of the Crown in chancery, who thereupon issues writs of election to the sheriffs, etc. (2 Steph. Com. 394 & seq.; 1 Bl. Com. 177 & seq.)

3^l. The Peculiar Privileges of the Commons.

It is the peculiar privilege of the Commons to originate all bills granting subsidies or parliamentary aids, or levying money in any way, whether by taxes, or pecuniary mulcts for offences; it being supposed that, as they are a temporary elective body, freely nominated by the people, they are less likely to be improperly influenced by the Crown than the permanent hereditary body of the Lords, and so constitute the safest depository of the vital power of taxation. (1 Bl. Com. 169-70; 2 Steph. Com. 375.)

4^g. The Laws and Customs of Parliament considered as one Aggregate Body.

See 1 Bl. Com. 160 & seq.; 2 Steph. Com. 364;

W. C.

1^h. The Power and Jurisdiction of Parliament is Transcendent and Absolute, confined within no prescribed Bounds.

See 1 Bl. Com. 160 & seq.

2^h. Each House is the exclusive Judge of the Right of its Members to sit, and of its own Privileges.

See 1 Bl. Com. 164 & seq.

3^h. The most Notorious Privileges of either House.

The most important privileges of parliament consist of the privilege of speech (but not of publication of speech), and freedom from imprisonment, save for indictable offences, in which case the house to which the person ac-

cused belongs is entitled to be immediately informed of the arrest, and of the cause of it. (1 Bl. Com. 164 & seq.)

5^g. Mode of Proceeding in Parliament; w. c.

1^h. Each House has its Speaker.

The speaker of the House of Lords is the lord chancellor, or keeper of the great seal, or any other appointed by the king's commission. The speaker of the House of Commons is elected by the house, but must be approved by the king. In either house a majority determines. In the House of Commons the speaker never votes, save in case of a tie; in the Lords' House, the speaker, if a member, votes with the rest, but has no *casting voice*. (1 Bl. Com. 181, & n. (73).)

2^h. Mode of passing Bills.

See 1 Bl. Com. 181 & seq.; 2 Steph. Com. 405 & seq.;

Ante, Introd. § iii. 2^a.

3^h. Mode of Adjournment, and of Prorogation.

An adjournment is no more than a continuance of the session from *one day to another*, as the word signifies, and may be done by either house separately. It does not put an end to unfinished business, which at the next meeting may be proceeded with, without any fresh commencement. (1 Bl. Com. 186.)

A prorogation is a continuance of the parliament *from one session to another*, and is done by royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the Crown, or frequently by proclamation. Both houses are necessarily prorogued at the same time. (1 Bl. Com. 187.)

6^g. Mode of Dissolution of Parliament.

Dissolution is the civil death of the parliament;

w. c.

1^h. Dissolution is affected by the King's Will, expressed either in Person, or by Representation.

See 1 Bl. Com. 188;

2^h. Dissolution effected by the Demise of the Crown.

At common law, immediately upon the death of the reigning sovereign; by statutes 7 & 8 Wm. III., and 6 Anne, six months afterwards, unless sooner prorogued or dissolved by the successor. (1 Bl. Com. 188.)

3^h. Dissolutions effected by Length of Time; w. c.

1ⁱ. Doctrine at Common Law.

The duration of parliament was only limited by the pleasure or death of the king, although it was required, at least by very early statutes (4 Edw. III., and 36 Edw. III.), *to be assembled* every year. (1 Bl. Com. 189, n. (83); Id. 153.)

2ⁱ. Doctrine by Stats. 6 Wm. & M. c. 2, and 16 Car. II., c. 1.

That a new parliament shall be called within three years

after the *determination* of the former, and that the *sittings* shall not be intermitted above three years at the most. (1 Bl. Com. 153, and n. (6).)

3^d. Doctrine by Stat. 1 Geo. I.

That a parliament *may* endure *seven* years. (4 Bl. Com. 189.)

CHAPTER III.

OF THE KING AND HIS TITLE TO THE CROWN.

2^d. The King, or Supreme Executive Power.

So much as is necessary to be known touching the king may be stated under the heads following, namely: (1), The title to the Crown; (2), The king's royal family; (3), The king's councils; (4), The king's duties; (5), The king's prerogative; (6), The king's revenue. (1 Bl. Com. 190.)

W. C.

1st. The Title to the Crown.

Out of regard to the public tranquillity, the rule of succession to the throne ought to be clear and indisputable. To that end, the Crown is by common law and constitutional custom *hereditary*; and this in a manner peculiar to itself; but that right of inheritance may from time to time be changed or limited by *act of parliament*; under which limitations the Crown still continues hereditary. (1 Bl. Com. 190-191.)

W. C.

1^h. The Attributes of the Succession to the Crown; w. c.

1ⁱ. The Crown is in general *Hereditary*, or descendible to the next Heir, on the Death or Demise of the last Occupant of the Throne.

Succession by *election*, which would otherwise be the most natural and expedient mode of succession, proves upon experiment to give too much scope to faction, intrigue and violence. (1 Bl. Com. 191 & seq.)

2ⁱ. Mode of Descent of the Crown.

In general the same as in case of lands, preferring males to females, and amongst males, the eldest; but a similar preference of the eldest exists as to the Crown amongst *females* also, the regal functions being indivisible. Nor is the half-blood excluded. (1 Bl. Com. 193-4.)

3ⁱ. The hereditary Right to the Crown is not *indefeasible*.

Parliament (consisting of King, Lords and Commons,) may alter the line of descent, exclude the immediate heir, and vest the inheritance in any one else. (1 Bl. Com. 195.)

- 4ⁱ. However the Crown be Limited or Transferred, it is still Hereditary in the Wearer.

See 1 Bl. Com. 196.

- 2^h. Historical View of the Succession to the Crown of England.

See 1 Bl. Com. 196 & seq.; 2 Steph. Com. 441 & seq.

CHAPTER IV.

OF THE KING'S ROYAL FAMILY.

- 2^g. The King's Royal Family.

See 1 Bl. Com. 217 & seq.; 2 Steph. Com. 465 & seq.

W. C.

- 1^h. The Queen; Wherein of

- 1ⁱ. The Queen regent, regnant or sovereign.

Has the same powers, prerogatives, rights, dignities and duties as if she had been a king; *e. g.*, Queen Mary, Queen Elizabeth, Queen Anne, and Queen Victoria. (1 Bl. Com. 217 & seq.)

- 2ⁱ. The Queen-Consort.

The wife of the reigning king, by virtue of her marriage, has divers prerogatives above other women; *e. g.*, she is a public person, distinct from the king; pays no toll, is liable to no amercement in any court; but is still the king's *subject*, not his equal; she has many pecuniary advantages, and in point of security of life and limb has the same protection as the king. If accused of treason, she is tried by the peers of parliament. (1 Bl. Com. 218 & seq.)

The husband of the queen regnant is her subject, as George of Denmark to Queen Anne, and Prince Albert to Queen Victoria. (1 Bl. Com. 222.)

- 3ⁱ. The Queen-Dowager.

The queen-dowager is the widow of the king, and enjoys most of the privileges belonging to her as queen-consort. (1 Bl. Com. 223.)

- 2^h. The Prince of Wales, or Heir-apparent to the Crown, his Royal Consort, and the Princess-royal, or Eldest Daughter of the King.

These are all by law peculiarly protected, because next in succession to the Crown. (1 Bl. Com. 223 & seq.)

- 3^h. The King's Younger Children and Grandchildren.

Being out of the immediate line of succession, they are entitled only to a certain degree of precedence before all peers and public officers. (1 Bl. Com. 223 & seq.; 2 Steph. Com. 472 & seq.)

4^b. More remote Relations of the King.

Entitled to not even places of precedence, except what belongs to them by their personal rank or dignity. (1 Bl. Com. 225.)

CHAPTER V.

OF THE COUNCILS BELONGING TO THE KING.

3^g. The Councils belonging to the King; w. c.

The councils belonging to the king consist of, (1), The high court of parliament; (2), The peers of the realm; (3), The judges; and (4), The privy council:
w. c.

1^h. The High Court of Parliament.

Already treated of, *Ante*, p. 85, 1^g, &c.

2^h. The Peers of the Realm.

By virtue of their peerage they are hereditary counselors of the Crown, and may be called together by the king to impart their advice, either in time of parliament or when no parliament is sitting. (1 Bl. Com. 227 & seq.)

3^h. The Judges of the Courts of Law, for Law-Matters.
See 1 Bl. Com. 229.4^h. The Privy Council.

Called, by way of eminence, *the Council*, and described by Sir Edward Coke as a noble, honorable, and reverend assembly of the king, such as he *wills to be of his privy council*. And as the *king's will* solely constitutes a privy councillor, so his will regulates the number, which anciently was about twelve; but having been inconveniently increased, it was by Charles II. in 1679 limited to thirty, and has since been again augmented, and is now indefinite. The inconvenience is obviated by ordinarily summoning to advise the sovereign those only who hold the principal offices of State, who are styled *Cabinet-ministers*. (1 Bl. Com. 230 & n. (2); 2 Steph. Com. 480;
w. c.

1ⁱ. The Qualifications of a Privy Councillor.

Must be a natural-born subject of England. (2 Steph. Com. 481; 1 Bl. Com. 230.)

2ⁱ. The Duty of a Privy Councillor.

See 1 Bl. Com. 230; 2 Steph. Com. 481.

To advise the king honestly; to be secret; to avoid corruption; firmly to maintain the resolves of the council; and in all things to act the part of a good and true counsellor.

3ⁱ. The Power of the Privy Council.

See 1 Bl. Com. 231; 2 Steph. Com. 481.

W. C.

1^k. To Enquire into all Offences against the Government, and to Commit the Offenders.

But not to punish them, nor to place them beyond the reach of the writ of *habeas corpus*. (1 Bl. Com. 231; 2 Steph. Com. 481.)

2^k. To exercise certain Judicial Powers.

W. C.

1^l. Mode of Administering the Judicial Power by the Privy Council.

This judicial power is administered by a committee of privy councillors, called the *Judicial Committee of the Privy Council*, who hear the allegations and proofs, and report to the king in council, by whom the judgment is finally given. The judicial committee consists of the lord president of the council, the lord chancellor, the occupants of certain judicial offices for the time being, and all members of the council who have been president, chancellor, or who have held any of the said judicial offices. (2 Steph. Com. 482-3.)

2^l. Cases wherein the Privy Council has Judicial Power.

See 2 Steph. Com. 482.

W. C.

1^m. Colonial Causes arising outside of the Jurisdiction of the Kingdom.2^m. Appeals from the Lord Chancellor, in Matters of Lunacy, or Idiocy.3^m. Appeals from the Ecclesiastical and Maritime Courts.4^m. Applications to Prolong the Terms of Patents for new Inventions, and to License the Re-publication of Books under the Copyright Act.5^m. Questions between two Provinces out of the Realm; and Claims asserted to an Island or Province, as a Feudal Principality.

Upon principles of feudal sovereignty.

6^m. Appeals from the Colonial Courts.

CHAPTER VI.

OF THE KING'S DUTIES.

4^g. The King's Duties.

The principal duty of the king is to govern his people according to law. *Nec regibus infinita aut libera potestas*,

was the constitution of our German ancestors, according to Tacitus. And this is strongly expressed, not only by Bracton and Fortescue, but also in the Year-books, (19 Hen. VI., 63): "*La ley est le plus haute inheritance que le roy ad : car par la ley il mene et tous ses sujets sont neles, et si le ley ne fuit, nul inheritance sera.*" It is also preserved and sanctioned by the terms of the coronation oath: "I solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same," &c. (1 Bl. Com. 233, & n. (1), & seq.)

CHAPTER VII.

OF THE KING'S PREROGATIVE.

5^g. The King's Prerogative.

The word *prerogative* signifies that special pre-eminence which the king has, in right of his royal dignity, above all other persons, and out of the ordinary course of the common law. It is not denied to the subjects of England to discuss and examine its limits, so it be done with decency and respect, notwithstanding the absurd claims to the contrary advanced by Queen Elizabeth and the Stuart princes who immediately succeeded her. But such was never the language of the ancient constitution and laws. Thus Bracton states it as a maxim of the English law, that "*rex debet esse sub lege, quia lex facit regem,*" and says, "*nihil enim aliud potest rex, nisi id solum quod de jure potest;*" and even in the reign of Charles I., Sir Henry Finch, whilst he lays down the law of prerogative in very strong and emphatic terms, yet qualifies it with the general restriction that "the king's prerogative stretcheth not to the *doing of any wrong.*" (1 Bl. Com. 238-9; 2 Steph. Com. 485-6;

W. C.

1^h. The King's *Incidental* prerogatives.

Being only exceptions in favor of the Crown to the general rules established for the rest of the community; *i. g.* that no costs can be recovered against the king; that he cannot be a joint-tenant; that his debt shall be preferred to other debts, &c. These will be considered in connection with the general rules to which they are exceptions. (1 Bl. Com. 240.)

2^h. The King's *Direct* Prerogatives, W. C.

1ⁱ. The Direct Prerogatives which relate to the King's *Dignity*, or Political Character.

Being certain qualities inherent in his royal capacity, distinct from and superior to those of any other individual in the nation, the design of which is to secure to him that reverence, respect and obedience which his high functions demand. (1 Bl. Com. 241 & seq.);

W. C.

1^k. The King's Personal Sovereignty, or Pre-eminence.

Hence he is exempt from all jurisdiction, civil and criminal, as the tranquillity and order of society require that he should be. (1 Bl. Com. 242; Montesq. Sp. of Laws, B. XI., ch. 6);

W. C.

1^l. The Protection afforded to the Subject against the Crown's Invasion of Rights by *Private Injuries*; w. c.

1^m. Private Injuries in point of Property.

The subject may petition the king in his court of chancery, where redress will be afforded as a matter of grace. (1 Bl. Com. 243.)

2^m. Private Injuries in point of Person.

They cannot frequently occur, and when they do, it is deemed better as a choice of evils to submit to them than to endanger the public peace and security, by subjecting the sovereign to answer. (1 Bl. Com. 243.)

2^l. The Protection afforded against the Crown's Public Oppressions; w. c.

1^m. Ordinary Public Oppression.

Such oppression can only exist by the advice of evil counsellors, and the assistance of wicked ministers (the king being capable of performing no ministerial act *in person*), and these may be examined and punished. (1 Bl. Com. 244.)

2^m. Extraordinary Public Oppressions tending to Dissolve the Constitution.

These are revolutionary proceedings, the occurrence of which the law cannot suppose. If they do unfortunately happen, they must be met by corresponding revolutionary and extraordinary remedies, as in the case of Charles I. and James II. (1 Bl. Com. 244-5.)

2^k. The King's *Absolute Perfection*; w. c.

1^l. The King *can do no Wrong*.

This ancient and fundamental maxim means only that whatever is exceptionable in the conduct of public affairs is to be imputed to the king's advisers and ministers, and not to himself *personally*; and that the prerogative being created for the benefit of the people, cannot be exerted to their prejudice. (1 Bl. Com. 246.)

2^l. The King *can think no Wrong*.

Which means that the king can never *mean* to do an unwise or an injurious action, and whatever of that

character proceeds from him is attributed to mere fraud and deception, which renders the act void. (1 Bl. Com. 246.)

This personal perfection, however, does not preclude the temperate and respectful discussion of the king's conduct, even by individuals, and much less in parliament. (1 Bl. Com. 247.)

- 3^l. The King can be Guilty of no *Laches*, or Negligence.

Hence no delay will bar his right. The ancient maxim is *nullum tempus occurrit regi*, it being intended that the king is always *busied for the public good*, and has not leisure to assert his rights.

Neither can the king be affected with an attainder for treason or felony; nor by infancy. (1 Bl. Com. 247 '8.)

- 3^k. The King's *Perpetuity*.

In his political capacity, the king *never dies*. There is in law no *interregnum*. Upon the death of the reigning prince, his kingship is vested at once in his heir, who is *eo instanti* king. (1 Bl. Com. 249.)

- 2ⁱ. The Direct Prerogatives which regard the King's *Authority*.

In the execution of these consists the *executive part* of the government, which is vested in a *single hand*, in order to secure unity and strength, the king being not only the *chief*, but properly the *sole*, executive magistrate, all others acting by commission from, and in subordination to him. The restraint consists in the responsibility of his advisers and ministers. (1 Bl. Com. 250 & seq.)

W. C.

- 1^k. The King's Authority in *Foreign Concerns*; W. C.

1. The Power to Send and Receive Ambassadors.

Ambassadors and other public ministers are employed to conduct the intercourse between independent states, and in order that they may attend fearlessly to the interests of the state they represent, they enjoy, amongst other privileges, the important one of exemption from the local jurisdiction, civil and criminal, of the foreign state to which they are accredited. (1 Bl. Com. 253 & seq.)

2. The Power to make Treaties.

The ministry being responsible. (1 Bl. Com. 257.)

3. The Power of making War and Peace.

Subject to the responsibility of the ministry. (1 Bl. Com. 257 '8.)

4. To issue Letters of *Marque and Reprisal*.

Empowering private persons to go beyond the *marches*, or boundaries of the realm, and to commit reprisals

upon the commerce of another state in order to obtain redress for an injury. It is a state of incipient war, and generally results in war. (1 Bl. Com. 258.)

5^l. To grant Safe-Conducts.

Usually applicable to a *time of war*, being a permission to foreigners to enter or to remain in the country. In peace the permission is generally called a *passport*. (1 Bl. Com. 259.)

2^k. The King's Authority in *Domestic Affairs*.

See 1 Bl. Com. 261 & seq.

W. C.

1^l. The King is a Constituent Part of the Supreme Legislative Power—that is, of Parliament.

He has the *veto power*, and is not bound by any act of parliament, unless he is named therein by special words. (1 Bl. Com. 261–2.)

2^l. The King is *Generalissimo* of the Kingdom.

He may raise and regulate fleets, armies, forts, &c.; may appoint *ports and havens* where—and where only—persons and merchandise may pass into and out of the realm; may regulate the erection of beacons, light-houses, and sea-marks; may prohibit the importation of arms or ammunition; and by writ of *ne exeat regno* may confine his subjects from going abroad. (1 Bl. Com. 262 & seq.)

3^l. The King is the *Fountain of Justice*, and General Conservator of the Peace of the Kingdom.

That is, he is the source whence justice is *distributed*, the courts (which he may erect at pleasure) being the necessary *conduits* through which it is transmitted to the people. Hence, the proceedings in the courts are *in his name*, and the courts are designated the *king's courts*. (1 Bl. Com. 266 & seq.);

W. C.

1^m. The Early Practice in Administering Justice.

By the King *in person*. (1 Bl. Com. 267.)

2^m. The Modern Practice in Administering Justice.

By judges appointed by the king, but who hold, not as formerly, *durante bene placito*, but (by Statute 13 Wm. III., and further, by Statute 1 George III.), notwithstanding the demise of the Crown, *quamdiu bene se gesserint*. They are removable, however, on the address of both houses of parliament.

3^m. In Criminal Proceedings the Crown is the *Prosecutor*, through its Appointed Officers.

See 1 Bl. Com. 268.

4^m. Reasons for Separating the Judicial Power from the Executive and Legislative, respectively,

See 1 Bl. Com. 269; Montesqu. Sp. of Laws, B. XI., ch. VI.

5^m. The King's Pardoning Power.

See 1 Bl. Com. 269.

6^m. The King's Legal *Ubiquity*.

In the eye of the law he is always present—that is, the *regal office* is in all his courts, and he is never said to appear *by attorney*. (1 Bl. Com. 270.)

7^m. The King's Prerogative of Using Proclamations.

Not to ordain *new laws*, but to enjoin the observance of those already in being; and also to give general instructions to the subjects touching matters within the king's cognizance. (1 Bl. Com. 270-'71.)

4^l. The King is the *Foundation of Office, of Honor, and of Privilege*.

That is, he is not merely the *distributor* (as in case of *justice*), but the *parent* of them. It is supposed that the King (being charged with the function of executing the laws) is a better judge than any one else of the merits of those whom he will employ, and ought to have it in his power to encourage fidelity and zeal by promotions and distinctions. (1 Bl. Com. 271-'2.)

5^l. The King is the Arbiter of Commerce.

That is, of domestic commerce only. (1 Bl. Com. 273 & seq.):

w. c.

1^m. Establishment of Public Marts, such as Markets and Fairs.

See 1 Bl. Com. 274.

2^m. The Regulation of Weights and Measures.

See 1 Bl. Com. 274 & seq.

3^m. To Coin Money, and Regulate the Value thereof.

See 1 Bl. Com. 276 & seq.

6^l. The King is the Head and Supreme Governor of the National Church.

See 1 Bl. Com. 278 & seq.

3^l. The Direct Prerogatives with regard to the King's Revenue.

Treated of under the next head, "Of the King's Revenue," *infra*, 6^g.

CHAPTER VIII.

OF THE KING'S REVENUE.

6^g. The King's Revenue; w. c.

1^h. The King's Ordinary Revenue.

See 1 Bl. Com. 282 & seq.

w. c.

- 1^l. The King's Ordinary Revenue derived from Ecclesiastical Sources; w. c.
- 1^k. The Custody of the Temporalities of Bishops, during Vacancies.
See 1 Bl. Com. 282-3.
- 2^k. A Corody from each Bishop for the Maintenance of a Royal Chaplain.
See 1 Bl. Com. 283.
- 3^k. Tithes arising in *Extra-parochial* Places.
See 1 Bl. Com. 284.
- 4^k. First Fruits, and the Tenths of all Spiritual Preferments.
See 1 Bl. Com. 284 & seq.
- 2ⁱ. The King's Ordinary Revenue derived from Temporal Sources.
See 1 Bl. Com. 286 & seq.
- w. c.
- 1^k. Rents and Profits of the Demesne-lands (*dominicales terre*) of the Crown.
See 1 Bl. Com. 286.
- 2^k. Profits derived from the Military Tenures *in Capite*.
Abolished by Stat. 12 Car. II., c. 24. (1 Bl. Com. 287-8.)
- 3^k. Profits derived from Wine Licenses.
See 1 Bl. Com. 288.
- 4^k. Profits derived from the Ordinary Courts of Justice.
In the way of fines, forfeitures of recognizances, fees for affixing seal, &c. (1 Bl. Com. 289.)
- 5^k. Profits derived from the King's Forests.
See 1 Bl. Com. 289.
- 6^k. Profits derived from *Royal Fish*, Whale and Sturgeon.
Grounded on the king's guarding the seas from pirates. (1 Bl. Com. 290.)
- 7^k. Profits derived from Shipwrecks.
Wreck, by the ancient common law, is where a ship is lost at sea, and the cargo or goods *are thrown upon the land*. The Crown succeeded to the goods as *bona vacantia*, if no *person* (by the laws of Henry I.), or no *person or animal* (by the laws of Henry III.), escaped alive; or, at present, if the ownership is not proved within a year and a day. (1 Bl. Com. 291-2.) The Crown, by the common law, and doubtless the Commonwealth of Virginia, succeeds to all *bona vacantia*. (1 Bl. Com. 298-9; Bract. L. I. c. 12);
- w. c.
- 1^l. A Proper Wreck at Common Law.
Goods *thrown on the land*, from a ship lost at sea. (1 Bl. Com. 292.)
- 2ⁱ. *Jetsam*, *Flotsam* and *Ligan*; w. c.
- 1^m. Jetsam.

Where goods are cast in the sea and *sink*. (1 Bl. Com. 292.)

2^m. Flotsam.

Where goods continue to *swim on the surface*. (1 Bl. Com. 292.)

3^m. Ligan.

Where the goods are sunk in the sea, but are *tied to a buoy*, so as to be found. (1 Bl. Com. 292.)

3^l. Modern Provisions touching Wrecks; w. c.

1^m. Salvage.

A reasonable reward provided for those who rescue ships and goods wrecked or in danger. (1 Bl. Com. 293.)

2^m. Provision to Assist Vessels in Distress (by the peace-officers on shore), and to punish such as endanger or destroy them.

See 1 Bl. Com. 293-4; V. C. 1873, ch. 90, § 1 & seq.; V. C. 1887, ch. 88, § 1938 & seq.

8^k. Profits derived from Mines of Gold and Silver.

See 1 Bl. Com. 294.

9^k Profits derived from *Treasure-Trove*.

That is from *treasure found*, the owner being unknown. (*Fr. trouver*, to find.) (1 Bl. Com. 295.)

10^k. Profits derived from *Waifs*, (*bona variata*).

That is, from goods *waived*, or thrown away by a thief in his flight, the owner being unknown. (1 Bl. Com. 296-7.)

11^k. Profits derived from *Estrays*.

That is, from valuable animals found astray, and wandering, the owner being unknown. (1 Bl. Com. 297; V. C. 1873, ch. 98, § 1 & seq.; V. C. 1887, ch. 94, § 2062.)

12^k. Profits derived from Goods and Lands Confiscated or Forfeited for Crime, including *Deodands*.

See 1 Bl. Com. 299 & seq.

13^k. Profits arising from Escheats of Lands, for Defect of Heirs.

See 1 Bl. Com. 302.

14^k. Profits arising from the Custody of Idiots and Lunatics; w. c.

1^l. The Case of an Idiot.

An idiot is one that hath no understanding from his nativity, and who is therefore by law presumed never likely to attain any. The fact is to be ascertained upon a writ *de idiota inquirendo* by a jury of twelve men; and upon its being so proved (which is rarely done), the Crown is entitled to the profits of his lands, and the custody (and consequent maintenance) of his person. (1 Bl. Com. 302-3.)

2^l. The Case of a Lunatic.

A lunatic is one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason, which yet the law presumes that he may recover. The fact of lunacy is ascertained by a *commission* issued by the chancellor (to whom, by special authority from the king, the custody of idiots and lunatics is entrusted), and thereupon provision is made for the sustentation and care of the lunatic's person, and the management of his estate, subject to accountability for the net profits, to the lunatic, or his heirs, etc. (1 Bl. Com. 304 and seq.; V. C. 1873, ch. 82, § 14 & seq.; V. C. 1887, ch. 75, §§ 1697 & seq.; 43 & seq.)

2^h. The King's Extraordinary Revenue.

Derived from aids, subsidies, or supplies, granted by the representatives of the people, assembled in parliament. (1 Bl. Com. 306 & seq.);

W. C.

1ⁱ. The Ancient Modes of Taxation.

See 1 Bl. Com. 308 & seq.

W. C.

1^k. Tenths and Fifteenths.

That is, tenths and fifteenths of *all the movables* belonging to the subject, at first according to new assessments made at every fresh grant, but in 8 Edw. III. (A. D. 1315), reduced to a certainty, namely, about £29,000 for the whole kingdom. (1 Bl. Com. 308-'9.)

2^k. Scutages.

That is, a pecuniary compensation for the military services, at first being arbitrary compositions as the king and subject could agree, which, leading to great abuses, King John was obliged to promise in his *Magna Charta* (Art. XIV., 1 Rap. 287, B. VIII.), that no scutage should be imposed without the consent of the common council of the realm; which, though omitted in 9 Hen. III., was restored by 25 Edw. I., c. 5 and 6; 34 Edw. I., St. 4, c. 1; and 14 Edw. III., St. 2, c. 1, and extended to the prohibition of *any* aid, task, tallage or tax, but by the common consent of the great men and commons in parliament. (1 Bl. Com. 309-'10.)

3^k. *Hydage*, upon all other Lands than those held in Chivalry, and *Tallage* upon Cities and Boroughs.

See 1 Bl. Com. 310.

Hydage, or hidage, is an extraordinary tax, payable for every *hyde* or hide (about 100 acres) of land. Otherwise called *hidegild*. (Burr. L. Dict. *in verb*.)

Tallage, or more properly *tallage* (from French *tailleur*, to cut), is a *share* of a man's substance, paid by way of tribute, toll or tax, so that it includes all taxes and bur-

deus set upon the subject, and was anciently called in English a *cutting*. (Burr. L. Dict. *in verbo*.)

4^k. Subsidies.

Introduced *temp.* Richard II. and Henry IV. (A. D. 1377 to 1413). A tax not immediately imposed on property, but upon persons, in respect of their *estimated* estates, according to an ancient and very moderate valuation, however, insomuch that one subsidy, according to Sir Ed. Coke, amounted, for the whole realm, to no more than £70,000. (1 Bl. Com. 310 & seq.)

5^k. Ecclesiastical Subsidies.

Granted by the clergy in *Convocation*, and confirmed by parliament, or else illegal. Amounted to about £2,000.

The last subsidy granted by clergy or laity was in 15 Car. II. (A. D. 1663). After that, the levies on *land* were merged in one tax, known as the *Land-tax*. (1 Bl. Com. 311 & seq.)

2ⁱ. The Modern Modes of Taxation.

See 1 Bl. Com. 312 '13, & n. (29); & n. (30); 2 Steph. Com. 574 & seq.;

W. C.

1^k. The Land-tax.

The modern substitute for the old charges upon lands. Having prevailed substantially, after 15 Car. II., it was formally recognized by the name of *land-tax*, by Stat. 4 Wm. & M., c. 1, (A. D. 1692). (1 Bl. Com. 312 '13, & notes (29) & (30); 2 Steph. Com. 574.)

2^k. The Customs.

Or duties, tolls, tributes levied upon merchandise exported and imported. (2 Steph. Com. 574; 1 Bl. Com. 313);

W. C.

1ⁱ. The Authority whereby alone all Customs, whether Immemorial or Recent, are Levied.

The authority of parliament, as insisted by Lord Coke, and expressly acknowledged by Stat. 25 Edw. I., c. 7. (2 Steph. Com. 575; 1 Bl. Com. 313 '14 and n. (33).)

2ⁱ. The Etymology of the word *Custom*.

The old Latin is *custum* (not *consuetudo*, which means usage only). It is derived from the French *coutum*, or *coutum* (toll or tribute), which comes from *coast* (price, charge or *cost*). (1 Bl. Com. 314, n. (34).)

3ⁱ. The several Customs Levied upon Goods in England;

W. C.

1^m. The Customs on Wool, Skins and Leather.

These were very ancient. Conferred indeed by parliament, and subject to its authority, but levied so un-

interruptedly, through such a series of reigns, as to have acquired the designation of *hereditary customs of the Crown*.

The three commodities named were styled *staple commodities*, because they could only be exported from those ports where the king's *staple* was established. (2 Steph. Com. 575; 1 Bl. Com. 314.)

2^m. The *Prisage* or *Butlerage* of Wines.

Prisage was the right of taking two tuns of wine from every ship importing twenty tuns or more. It was called *butlerage*, because having been commuted, by charter Edw. I., for a duty of two shillings a tun imported by "merchant strangers," it was paid to the king's *butler*. (1 Bl. Com. 314-15.)

3^m. Subsidies, Tonnage and Poundage.

Subsidies were duties imposed by parliament upon the staple commodities alone (1^m.) over and above the *custuma antiqua et magna*. (1 Bl. Com. 215; 2 Steph. Com. 576.)

Tonnage was duty upon all wines imported over and above *prisage* and *butlerage* (*supra*, 2^m). (1 Bl. Com. 315; 2 Steph. Com. 576.)

Poundage was an *ad valorem* duty of 12d. in the pound on all merchandise whatsoever. (1 Bl. Com. 315; 2 Steph. Com. 576.)

4^m. The Modern Duties Levied from Time to Time by Act of Parliament.

Paid immediately by the merchant, but ultimately by the consumer. The least perceived, and so the least burdensome of taxes, if laid in moderation, but if excessive, smuggling is encouraged (which demoralizes the people, whilst it lessens the revenue), and the cost to the consumer is multiplied by the profit levied by each middle-man upon the duty, as well as the original price. This latter evil is somewhat mitigated by the *warehousing system*, whereby imported goods are kept in public warehouses until sold, and *then* the duty is paid. (1 Bl. Com. 317-18; 2 Steph. Com. 578-9.)

3^k. The Excise Duty.

An inland imposition, charged for the most part on the *manufacturer*, but sometimes on the *consumer*. Unpopular, because it leads to domiciliary visits and searches. First introduced (on the model of a Dutch prototype), by the parliament, in 1643, after the rupture with Charles I., under the auspices of Mr. Pym, the popular leader. The principal articles subject to the excise, are salt, spirits, soap, glass, paper, bricks, hops, sugar, and vinegar. (1 Bl. Com. 313, 318 & seq.; 2 Steph. Com. 579 & seq.)

4^k. The Post Office Duty for the Carriage of Letters, &c.

Commenced by James I., with a foreign mail only, extended by Charles I. (A. D. 1635), to a few of the principal roads in England and Scotland, and finally (in A. D. 1643), established upon a regular and extended plan, devised by Edmond Prideaux, attorney-general to the Commonwealth, after the execution of King Charles. But since 3 & 4 Vict. c. 96, the consideration of the public convenience has so far prevailed over that of revenue, that the charges have been reduced to an amount so small as barely to pay the expense of the service. (1 Bl. Com. 321 & seq.; 2 Steph. Com. 582 '3.)

5^k. The Stamp-Duties.

A tax imposed upon all parchment and paper whereon any private deeds or other instruments of writing, of almost any nature whatsoever, are written; and upon all newspapers, cards, and dice; to which may be added, as belonging to the same branch of revenue, the duties payable for licenses to keep hackney-carriages and stage-carriages, or to trade as hawkers and peddlars. Stamp-duties were first instituted by Stat. 5 & 6 W. & M. c. 21. (1 Bl. Com. 323 '4; 2 Steph. Com. 584.)

6^k. Duties upon Articles in the Use or Keeping of Subjects.

Namely, duties on windows, servants, carriages, horses, dogs, hair-powder, armorial bearings, and game-certificates. (2 Steph. Com. 585.)

7^k. Duties upon Offices and Pensions.

Consisting in an annual payment (over and above all other duties), out of all salaries, fees and perquisites of offices and pensions, derived from the Crown, exceeding £100 per annum. First imposed by Stat. 21 Geo. II., c. 22. (2 Steph. Com. 586; 1 Bl. Com. 326.)

8^k. The Property and Income Tax.

Imposed by 5 & 6 Vic. c. 35, purporting to be a temporary expedient. (2 Steph. Com. 586, n. (m).)

3^h. The Purposes to which the King's Revenue, Ordinary and Extraordinary, is Expected to be Applied; w. c.

1ⁱ. To Discharge the Annual Expenses of the Public Service.

2ⁱ. The Civil List.

For the expenses of the royal household and establishment, as distinguished from the general exigencies of the State; and in lieu of the proper patrimony of the Crown, which has been assigned to the public use. It is usually granted at the commencement of each reign, for the sovereign's life. The amount settled on Queen Victoria is £385,000, of which £60,000 is assigned for her privy purse. (2 Steph. Com. 591; 1 Bl. Com. 331 & seq.)

3ⁱ. To meet the Payments required on Account of the National Debt; w. c.

1^k. The Unfunded Debt.

Comparatively of small amount (about £24,000,000 in 1845), and generally secured by *exchequer-bills*, which are instruments issued at the exchequer, under the authority, for the most part, of acts of parliament passed for the purpose, engaging, on the part of the government, to repay the principal sums advanced, with interest. (2 Steph. Com. 586.)

2^k. The Funded Debt.

Consisting of annuities granted by parliament to the public creditors, for the most part in perpetuity, affording a certain interest forever upon the principal sum, to the payment whereof the public faith is pledged. The certificates of these annuities are transferable by the holder, and afford convenient investments, contributing also to interest multitudes of the subjects of the realm in the stability of the government. The funded debt, which, when Blackstone wrote, was £136,000,000, had increased in 1842 to £774,000,000, involving an annual expense of £29,000,000. (2 Steph. Com. 587 & seq.)

CHAPTER IX.

OF SUBORDINATE MAGISTRATES.

2^o. Subordinate Magistrates.

Subordinate magistrates do not include the principal officers of state, such as the secretaries of state, etc., because as such these latter have no important share of magistracy conferred upon them (except that in England, the secretaries of state may commit offenders for trial); nor the chancellor, and other judges of the superior courts, because they will find a more proper place elsewhere; nor mayors or aldermen of corporations, because their functions depend on the charter and franchises of the corporation; but they include such as are generally in use, dispersedly, through the realm. (1 Bl. Com. 338 & seq.; 3 Steph. Com. 17 & seq.)

The subordinate magistrates now to be treated of are, (1), The sheriff; (2), The coroner; (3), Justices of the peace; (4), Constables; (5), Surveyors of highways; (6), Overseers of the poor; (7), Escheators; and (8), Supervisors.

The doctrine touching each of these classes of magistrates will be presented under the heads following, namely: 1. The

antiquity and original of the office; 2, The mode of appointment and removal of the incumbent, and modes of securing his fidelity in office; 3, The duties of the office; and 4, The assistants who may be employed; all of which topics are as interesting to an American lawyer as to the auditor of Blackstone's lectures.

Let us now consider, in order, the several subordinate magistrates above named:

W. C.

1st. The Sheriff.

See 1 Bl. Com. 339 & seq.; 3 Steph. Com. 21 & seq.; Bac. Abr. Sheriff; 1 Tuck. Com. 45 & seq.;

W. C.

1st. The Antiquity and Original of the Office of Sheriff.

The office of sheriff is of great antiquity. The name is derived from the Saxon words *scire-gerefa*, the *reeve*, or steward of the *shire*. In Latin he is called *vices-comes*, as being the deputy of the earl (*comes*), to whom the custody of the shire was committed, it is said, at the first division of the kingdom into counties. In process of time, the other engagements of the earl obliged him to devolve the whole of the actual business on the sheriff, who, though still called *vices-comes*, is entirely independent of the earl, the king by his letters-patent committing the care of the county (*constabulum comitatus*), to the sheriff, and to him alone. (1 Bl. Com. 339.)

2nd. The Mode of Appointment and of Removal of Sheriffs, and Modes of Securing their Fidelity in Office; w. c.

1^h. Mode of Appointment and of Removal of Sheriffs, and Modes of Securing their Fidelity in Office, *in England*; w. c.

1ⁱ. Mode of Appointment of Sheriff in England.

Formerly the sheriff was chosen by the inhabitants of the several counties (where the office was not hereditary), the election probably requiring the royal approval, as in the Gothic constitution was the case with the judges of the county courts (an office discharged by the sheriff). These popular elections having become, as was alleged, tumultuous, the Stat. 9 Edw. II. directed the sheriff to be assigned by the chancellor, treasurer and judges; and subsequent statutes ordain that the chancellor, treasurer and other high officers, together with all the judges (now fifteen in number), shall *annually* propose *three* persons to the king for each county; and he appoints one to be sheriff, to serve *durante bene placito*, though sure to be superseded in practice, within three years, as indeed is required by sundry statutes. (1 Bl. Com. 339 & seq.; 3 Steph. Com. 21 & seq.; Bac. Abr. Sheriff (E.); 2 Broom. & H. Com. 99.)

2ⁱ. Mode of *Removal* of Sheriffs in England.

It seems that the sheriff's office is liable to be determined by the nomination of a successor, by his own death, or by the lapse of six months after the demise of the Crown without his being re-appointed; or by *non-user*, *mis-user*, etc. (1 Bl. Com. 342, 3 Steph. Com. 24; Bac. Abr. Offices (M).)

3ⁱ. Mode of securing *Fidelity in Office* in Sheriffs, in England.

The official fidelity of the sheriff in England seems, in general, to be no otherwise secured than by his oath of office, which is long and comprehensive. But no one (by Stat. 13 & 14 Car. II., c. 21, § 7), can be assigned for sheriff, unless he have sufficient lands within the county to answer the king and his people; and it seems the king may besides require him to find surety for performing his office. (1 Bl. Com. 339, n. (1); Id. 342, n. (10); 3 Steph. Com. 24-5; Bac. Abr. Sheriff, (C).)

2^h. Mode of Appointment of Sheriff, and of Removal, and Modes of Securing Fidelity in Office, in *Virginia*.1ⁱ. Mode of *Appointment* of Sheriff in Virginia.

The sheriff in Virginia is elected by the qualified voters of each county, on the fourth Thursday in May, to enter upon office on the first day of July succeeding, and to hold office for *four years*, and until his successor has *qualified*. He can hold no other office; *i. e.*, whilst he continues to be sheriff; and may be required by law to renew his security. (Amended Const. 1869, Art. VII., §§ 1, 5; Id. Art. VI., § 25; V. C. 1887, pp. 44, 43.)

2ⁱ. Modes of *Removal* of Sheriffs in Virginia; w. c.1^k. Causes of Removal from Office of Sheriff.

These causes of removal, and modes of effecting it, are, for the most part, applicable as well to other officers as to sheriffs, and are enumerated here once for all, the reader being desired to observe that there is, or may be, some qualification in respect to each officer;

w. c.

1ⁱ. Being Concerned in a Duel, or Sending or Accepting, or Carrying a Challenge, unless the Party's Disabilities have been removed.

See V. C. 1873, ch. 11, § 1; V. C. 1887, ch. 12, § 162; Const. 1869, Art. III. § 1 (cl. 3); V. C. 1873, ch. 7, § 1 (cl. 3); V. C. 1887, ch. 8, § 62 (cl. 3).

2ⁱ. Holding any Post of Trust or Profit under the Government of the United States, or Receiving any Emolument therefrom,—with a few exceptions,—and the acceptance of any Emolument whatever from that government (with those exceptions), shall *ipso facto* vacate any State, county or corporation office. (V. C. 1887, ch. 12, §§ 163, 164.)

These exceptions are as follows, the first two being applicable to sheriffs and all other officers, and the third only to justices of the peace, etc., as mentioned under that head:

1. Military pensioners for wounds received in war, are not precluded from any State office thereby.

2. Militia officers and soldiers called out into actual duty, and paid by the United States accordingly, are not thereby precluded from any State office.

3. Members of Congress are not precluded from acting as *justices, as visitors of the University and of the Military Institute, or as officers of the militia.*

See V. C. 1873, ch. 11 §§ 2, 3; V. C. 1887, §§ 163, 164; Com'th v. Sherrard, 4 Leigh, 643.

Let it be observed, however, that this disqualification is applied to those offices only which are filled by *appointment*, and not to those filled by *popular election*, the Constitution of the state providing that "All persons *entitled to vote* shall be *eligible to any office* within the *gift of the people*, except as restricted in this Constitution." (Va. Const. Art. III. § 2.)

3^d. Accepting an Incompatible Office.

See Bac. Abr. Offices (K.), 2; Com'th v. Tate, 3 Leigh, 802.

It has been often said that the acceptance of an incompatible office *ipso facto* vacated the first office, without any judicial proceeding. (King v. Trelawney, 3 Burr, 1616; Milward v. Thatcher, 2 T. R. 87; Rex v. Pateman, 2 T. R. 777); and that proposition was so laid down without qualification, by the Court of Appeals in Virginia, in Shell v. Cousins, 77 Va. 330-31. It was held, however, in K. B. in Rex v. Patteson, 4 B. & Ad. (24 E. C. L.), 9, that whilst it was invariably true that the acceptance of an incompatible office was good ground for vacating the first office by means of a judicial proceeding, it did not operate *per se* to make the first office vacant, except when the appointment to the incompatible office was made by or with the privity of that authority which has the power to accept the surrender of the first or to remove from it; and pains are taken to show that in most, if not in all, the cases when the first office has been *absolutely void*, the appointment to the incompatible office emanated from a source which might have accepted the surrender of the first office, or have removed the occupant from it. And in this opinion, which seems to be founded in good reason, Mr. Dillon concurs. (1 Dill. Mun. Corp. § 165.) The mischiefs which would result to the public at large from holding the first office in all cases vacated merely

by the acceptance of the second, without inquiry, and without judicial sentence, constitute a powerful argument in favor of the proposition, as stated by Dillon, and by the K. B. in *Rex v. Patteson*.

- 4^l. Removal of *Residence* from the Sphere of Duty; *e. g.*, in case of the Sheriff from the county.

See *Chew v. Justices of Spottsylvania*, 2 Va. Cas. 208; *Poulson v. Justices of Accomac*, 2 Leigh, 743.

- 5^l. Conviction of Felony.

See V. C. 1873, ch. 11, § 4; V. C. 1887 ch. 12, § 165; *Fugate's Case*, 2 Leigh, 724.

- 6^l. Malfeasance or Non-feasance in Office.

e. g., By refusal to act or neglect of duty; by drunkenness whilst in discharge of duty, etc. (Bac. Abr. Offices (M.); *Mann's Case*, 1 Va. Cas. 138; *Alexander's Case*, Id. 156; Synops. Crim. Law, 145.)

- 7^l. Contracting to sell the *Office* or the *Deputation* of it.

To sell or let to farm the *deputation* of any post, including that of sheriff, or to sell or let to farm the post itself, is a cause of removal from the post and a perpetual disqualification to both buyer and seller to hold it. (V. C. 1873, ch. 11, § 5, 6; V. C. 1887, ch. 12, § 166.)

- 2^k. Mode of Proceeding in order to Remove a Sheriff or other Officer, in Virginia.

The proceeding is by information or indictment in the county or corporation *court*, or by writ of *quo warranto* in the circuit or corporation court; and if in either proceeding the party be convicted, judgment of *amotion from office* is pronounced. (1 Tuck. Com. 11, B. II.; *Alexander's Case*, 1 Va. Cas. 156; *Mann's Case*, Id. 308; *Wallace's Case*, 2 Va. Cas. 130; V. C. 1887, ch. 145, §§ 3022 &c.). The removal of any county, city or district officer for malfeasance, misfeasance, incompetency, or gross neglect of official duty, may also be effected by motion, after reasonable notice to the offender, to the county or corporation court. (V. C. 1887, ch. 35, § 821.)

- 3^l. Modes of Securing the Fidelity in Office of the Sheriff, in Virginia.

The fidelity in office of a sheriff in Virginia is secured by an oath of office and an official bond; and any party acting as sheriff, or other officer, before taking the oath prescribed, or before giving the bonds required by law, is liable to forfeit from \$100 to \$1,000. (V. C. 1873, ch. 12, § 9; V. C. 1887, ch. 13, § 182.)

W. C.

- 1^k. The Oath of Office.

See Va. Const. 1869, Art. III., § 5; U. S. Const. Art. VI., § 3; V. C. 1873, ch. 12, §§ 1, 3; V. C. 1887, ch. 13, §§ 168-174.

If the oath of office is not taken within the time prescribed, and in all cases before the day whereon their terms respectively begin, the office is *ipso facto* vacated, and the duties of the office must continue to be discharged by the incumbent. (1 Bramham v. Long, 78 Va., 352; Owens v. O'Brien, 78 Va., 116.)

W. C.

1. The Oath to Support and Maintain the Constitution and Laws of the United States, and of Virginia.
2. To Recognize and Accept the Civil and Political Equality of all Men before the Law.
3. To Perform Faithfully the Duties of the Office.

The anti-duelling oath was, until April 21, 1882, not exacted, but since the adoption of the constitution (i. e., since 26th day of January, 1870), to fight a duel with a deadly weapon, or to send or accept a challenge within or beyond the limits of Virginia, or knowingly to convey a challenge, or in any manner to aid or assist in fighting a duel, is a disqualification for office, and for the exercise of suffrage; but by an unhappy amendment, which completely frustrates the effect of the provision, power is given to the Legislature, by a two-thirds vote, to remove the disability. (Const. 1869, Art. III., § 1, (cl. 3); Amended Const. Acts 1876-'77, p. 412, Art V., § 20; V. C. 1873, ch. 11, § 1; V. C. 1887, ch. 13, §§ 169, 170.)

4. Anti-Duelling Oath.

The anti-duelling oath is, by act of April 21, 1882, required to be taken by "every person elected or appointed to any post or office under the laws of this Commonwealth, including members of the General Assembly," before he acts in such office. The oath in substance is, that the party has not, since the *first day of May*, 1882, fought or been in any wise concerned, or engaged, directly or indirectly, in a duel *actually fought*, nor will be during his continuance in office, *so engaged*, directly or indirectly. There shall be exempted, however, from the operation of this act, any commissioner, residing in another State, appointed by the Governor, and such other persons as the law may specially direct. (V. C. 1887, ch. 13, §§ 169, 170.)

If the party's disabilities have been removed by the General Assembly, the oath is so modified as to relate to the future only. (V. C. 1887, ch. 13, § 170.)

- 2^k. Official Bond.

It has long been the settled policy in Virginia to exact a bond, with sufficient security, from all persons charged with any public trust which involves the receipt of money belonging to other persons, and hence it is pro-

vided that the county or circuit court is to take from the sheriff bond, with sufficient surety, payable to the Commonwealth of Virginia, in such penalty as the court may deem sufficient, not less than \$10,000, nor more than \$60,000, conditioned for the faithful discharge of the duties of his office. (V. C. 1873, ch. 49, §§ 2, 3; Id. ch. 12, § 6; V. C. 1887, ch. 35, §§ 814, 816; Id. ch. 13, §§ 177, 179.)

And it should be observed, that the official bond which in its condition recites the sheriff's election or appointment, estops both the sheriff himself and his sureties from denying the validity of his title. They cannot say that he is not sheriff *de jure*, or that the court had no authority to take the bond. (Monteith v. Com'th, 15 Grat. 184-'5; Cutler v. Dickinson, 8 Pick. (Mass.) 386; Allen v. Luckett, 3 J. J. Marsh. (Ky.) 165; Stockton v. Turner, 7 Id. 192; Kellar v. Bealer, 4 Id. 655; Franklin v. Depriest, 13 Grat. 265.)

3^g. The Duties of Sheriff; w. c.

1^h. The Duties of Sheriff *in England*.

See 1 Bl. Com. 343 & seq.; Bac. Abr. Sheriff, (L.) to (O.); w. c.

1ⁱ. Judicial Duties of Sheriff in England; w. c.

1^k. To Hear and Determine Causes of Forty Shillings Value and under, in his County Court.

See 1 Bl. Com. 343; 3 Steph. Com. 25; Bac. Abr. Sheriff, (L.)

2^k. To try Issues out of the Superior Courts, in Cases of Debt or Demand, not exceeding £20.

See Stat. 3 and 4 Wm. IV., c. 42; 3 Steph. Com. 25, n. (a).

3^k. To Try in his County Court divers other Civil Causes; and in his *Tourn* (or Court of View of *Frank-pledge*) all *Common Law* Misdemeanors, to a Certain Extent.

See 1 Bl. Com. 343; 3 Steph. Com. 25; Bac. Abr. Courts (Sheriff's Torn), (C.) & (D.)

4^k. To Execute Writs of Partition, and of Admeasurement of Dower, by means of a Jury.

See Bac. Abr. Sheriff, (H.) 3; Wroe v. Harris, 2 Wash. 129.

5^k. To be a Conservator of the Peace.

As the principal conservator of the peace within his county, he may apprehend and commit for breach of the peace, and may take recognizance for keeping it. (1 Bl. Com. 343; Bac. Abr. Sheriff, (L.).)

6^k. To Decide the Elections of Knights of the Shire, &c.; to Judge of the Qualifications of Voters, and to Return such Candidates as he shall Determine to be Duly Elected..

See Bl. Com. 343; 3 Steph. Com. 25.

In Virginia, five commissioners from among the judges of election are appointed *annually* by the county and corporation courts, who determine the qualifications of voters. And in case of a tie, elections are decided by lot, that is, so far as concerns the return, or official report of the result. But in respect to elections to either house of the legislature, it is provided by the constitution (Art. V., § 7), that "each house shall judge of the election, qualification and returns of its members." (V. C. 1873, ch. 8, § 24; V. C. 1887, ch. 10, §§ 133-135.)

2^d. Ministerial Duties of Sheriff in England; w. c.

1^k. To act as the Ministerial Officer of the King's Courts.

Thus it is the sheriff's duty to serve the writ summoning the defendant to answer the plaintiff's complaint, and if need be to arrest and imprison him, or to take bail; to summon and return the jury; and finally to execute the judgment of the court, &c. (1 Bl. Com. 344; Bac. Abr. Sheriff, (M).)

2^k. To act as the King's Bailiff.

In order to preserve the king's rights within his bailiwick or county, the sheriff is to seize for the Crown the lands devolved to it by attainder or escheat; to levy fines and forfeitures; to seize and keep waifs, wrecks, estrays and treasure-trove; and to collect the king's rents. (1 Bl. Com. 344.)

3^k. To Execute Writs of *Ad quod damnum* and *Elegit*.

See Bac. Abr. Sheriff, (H.); Wroe v. Harris, 2 Wash. 129; Fulwood's Case, 4 Co. 65, b.

2^d. The Duties of Sheriff in Virginia.

See 1 Tuck. Com. 46, & seq.; B. I.; 1 Bl. Com. 343, & seq.; Bac. Abr. Sheriff, (L.) to (O); w. c.

1^d. Judicial Duties of Sheriff in Virginia; w. c.

1^k. To Execute Writs of Partition, and of Admeasurement of Dower, by means of a Jury.

See 1 Tuck. Com. 46, B. I.; Bac. Abr. Sheriff, (H.) 3; Wroe v. Harris, 2 Wash. 129.

2^k. To be a Conservator of the Peace.

See *Supra*, 5^k; 1 Bl. Com. 343; Bac. Abr. Sheriff, (L.)

2^d. Ministerial Duties of Sheriff in Virginia; w. c.

1^k. To act as the Ministerial Officer of the Courts of Record.

See *Supra*, 1^k; 1 Bl. Com. 344; Bac. Abr. Sheriff, (M.); 1 Tuck. Com. 46, B. I.; V. C. 1873, ch. 166, § 2, & seq.; Id. ch. 49, § 27, & seq.; V. C. 1887, ch. 158, §§ 3220 & seq.; Id. ch. 39, §§ 900, & seq.

2^k. To Execute Writs of *Ad quod damnum* and of *Elegit*.

See Bac. Abr. Sheriff, (H.) 3; Wroe v. Harris, 2 Wash.

129; Fulwood's Case, 4 Co. 65, b; Tillotson v. Cheatham, 2 Johns. (N. Y.) 69.

4^g. The Assistants Employed by the Sheriff;

Under this head may be enumerated, (1), Under-Sheriffs or deputies; (2), Jailors; (3), Bailiffs; (4), Posse Comitatus. w. c.

1^h. Under-Sheriffs or Deputies; w. c.

1ⁱ. The Mode of Appointment of Deputy-sheriffs in Virginia.

The deputy has hitherto *farmed* (that is, bought), the deputation from the sheriff, a proceeding forbidden always under heavy penalties in all other cases, and now under like penalties forbidden in this. (V. C. 1873, ch. 11, § 5; V. C. 1887, ch. 12, § 166; V. C. 1873, ch. 190, §§ 4, 5; V. C. 1887, ch. 183, §§ 3744, 3745.) The check to prevent abuse was that no deputy could be appointed by the sheriff without being subject to the approval and control of the county or corporation court, or of the judge in vacation, and in the latter case *in writing*. (V. C. 1873, ch. 11, § 6; Id. ch. 49, § 21; Jacobs v. Commonwealth, 2 Leigh, 709.) The deputy is now appointed by the sheriff, with the consent of the court of his county. (V. C. 1887, ch. 35, § 817.)

2ⁱ. Guaranties of Fidelity in Deputy Sheriffs in Virginia; w. c.

1^k. Oath of Office of Deputy Sheriff.

The deputy is required to take the same oath of office as the sheriff himself. (*Ante* p. 110, 1^k.)

2^k. Official Bond of Deputy Sheriff.

The commonwealth requires no bond of the deputy sheriff, because the sheriff is answerable *civilly* for whatsoever default or misconduct the deputy is guilty of, *colore officii*. But the sheriff, for his own security, usually requires bond, with sufficient surety, conditioned to indemnify and save him harmless against all loss and damage arising out of the official default or misconduct of the deputy. (Grayd. Forms, 138; Royster v. Leake, 2 Munf. 280; Munford v. Rice, 6 Munf. 81; Jacobs v. Hill, 2 Leigh, 393; Tyree & als. v. Wilson, 9 Grat. 59; Tyree & als. v. Donnally, Id. 64; Cox & als. v. Thomas, Id. 312; Mosby, &c. v. Mosby, Id. 584; Monteith v. Commonwealth, 15 Grat. 172; Sangster v. Commonwealth, 17 Grat. 124; Ballard v. Thomas, 19 Grat. 14.)

3ⁱ. Deputy Sheriff's Term of Office.

The deputy sheriff's term of office terminates with that of the principal, and may also be determined before, at the pleasure of the principal (subject to his responsibility on his contract or deputation, should he do it without cause), or of the county or corporation court, or of the judge in vacation, who may in his discretion remove the deputy at any time. (V. C. 1873, ch. 49, § 22; V. C.

1887, ch. 39, § 892; *Hoge v. Trigg*, 4 Munt. 154; *Montgomery v. Henry*, 1 Dall. 49.)

The death of the principal does not (as at common law) determine the deputy's office; but if not removed by the court, nor by the sheriff's personal representatives, he may continue to act in the dead principal's name, until the qualification of a new sheriff. (V. C. 1873, ch. 49, § 23; V. C. 1887, ch. 39, § 892.)

The authority of the deputy to act continues as long as that of the principal. Hence any official action begun by the deputy during the principal's term of office, such as levying an execution, or undertaking the administration of a decedent's estate (the duty being regarded as an entire thing), must be completed by the deputy, even after the principal's term has expired, and the principal and his sureties will be answerable for the faithful performance of the duty. (*Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Larned v. Allen*, 13 Mass. 295; *People v. Baker*, 20 Wend. (N. Y.) 602; *Hill v. Fitzpatrick*, 6 Ala. 314; *Dabney v. Smith*, 5 Leigh. 13; *Douglas v. Stump*, 5 Leigh. 392; *Tyree v. Wilson*, 9 Grat. 61; *Clark v. Withers*, 6 Mod. 299; *Wilbraham v. Snow*, 2 Wms. Saund. 47 and n. (2).)

4ⁱ. Duties which a Deputy Sheriff may Perform; w. c.

1^k. Doctrine at Common Law.

The deputy may, at common law, perform all the duties of sheriff, save only such as are *judicial* (e. g., a writ of *admeasurement of dower* or of *re-disscisin*), or such as the sheriff is, by the terms of the writ, required to execute *in person* (e. g., a writ of *partition*, or of *inquiry of waste*). (Bac. Abr. Sheriff, (H.) 3; 1 Tuck. Com. 48, B. I.)

2^k. Doctrine by Statute in Virginia.

The deputy sheriff, during his continuance in office, may discharge *any of the official duties* of his principal, unless otherwise provided by law. (V. C. 1873, ch. 49, § 21; V. C. 1887, ch. 35, § 817.)

5ⁱ. Liability of Sheriff for the Official Acts and Defaults of his Deputy; w. c.

1^k. Doctrine at Common Law.

The sheriff is liable *civiliter* (and in England liable *exclusively*), for all acts and defaults of his deputy, *colore officii*. Indeed, the sheriff and his deputies are considered as *one officer*. (*Saunderson v. Baker*, 3 Wils. 309 (S. C. 2 Wm. Bl. 832); Bac. Abr. Sheriff, (H.) 4, (P); *James v. McCubbin*, 2 Call, 273; *Moore's Adm'r v. Dawney & al.*, 3 H. & M. 132; *White v. Johnson*, 1 Wash. 160; *Hazard v. Israel*, 1 Binn. 240; *Cameron & als. v. Reynolds*, Cowp. 403.)

2^k. Doctrine in Virginia, by Statute.

In case of *return* on process, by an officer, or his

deputy, such as entitles any person to *recover money* from such officer *by action*, the person aggrieved may recover it *by motion* against the officer and his sureties, or against the deputy (if the return were by a deputy) and his. In all other cases, the proceeding must be against the sheriff and his sureties only, and not against the deputy, leaving the sheriff or his sureties to recover of the deputy. (V. C. 1873, ch. 49, §§ 45, 46, 47; V. C. 1887, ch. 39, §§ 909-912; 1 Tuck. Com. 48, B. I.; Fisher v. Vanmeter, 9 Leigh, 27. But see Richardson v. Perkins, 4 Munf. 512; 3 Rob. Pr. (2d ed.) 79; Ramsey v. McCue, 21 Grat. 349.)

But *criminally*, the deputy alone is liable to punishment (unless it be only a fine or pecuniary penalty), and not the sheriff, unless he personally concurred in the act. (Lewis' Case, 4 Leigh, 664; Bac. Abr. Sheriff, (H.) 4.)

As between the sheriff and his deputy and the latter's sureties, the rule is that a judgment rendered against the sheriff for the deputy's default, in a suit which was defended by the deputy, or which he was duly notified to defend, and had an opportunity of defending, is, in the absence of fraud or collusion, *conclusive evidence*, not only against the deputy, but against his sureties also. (Crawford v. Turk, 24 Grat. 179 & seq., 186 & seq.; McDaniell v. Brown, 8 Leigh, 118; Scott v. Tankersley, 10 Leigh, 581.)

2^h. Jailors.

The sheriff is in law the jailor, and he is responsible *civilly*, but not *criminally* (unless he actually concurred in it), for the official conduct of *his deputy*, who has the actual custody of the prison. (V. C. 1873, ch. 50, § 6; V. C. 1887, ch. 42, §§ 934, 930; Dabney v. Taliaferro, 4 Rand, 256; Bailey v. Griffith, 8 Leigh, 442.)

W. C.

1ⁱ. Jailor's Duties in Virginia in Respect to the Comfort and Health of Prisoners.

The jailor is required to have the jail whitewashed twice a year, and kept properly aired, and clean; to furnish the prisoners wholesome and sufficient food, bed and bedding, and also with fire when needed; to provide nursing and attendance, in case of sickness, and, if practicable, a separate apartment; and to exclude the intemperate use of ardent spirits. The observance of these regulations is secured by a quarterly inspection, made by a committee of three persons (one of them a physician), appointed by the county or corporation court, and acting under a peculiarly stringent oath. (V. C. 1873, ch. 50, §§ 3, 4, 5; V. C. 1887, ch. 42, §§ 928, 929.)

And when a prisoner charged with or convicted of an offence, is unable to provide himself with sufficient cloth-

ing, the court may direct the jailer to provide him clothing, and allow therefor not exceeding \$10 in one year; which allowance being certified by the court, shall be paid out of the treasury. (V. C. 1873, ch. 204, § 3; V. C. 1887, ch. 199, § 4079.)

The expense attending the due keeping of the *jail-building*, is defrayed by the county (V. C. 1873, ch. 50, § 12; V. C. 1887, ch. 42, §§ 925 &c., 934 &c., 936); that of providing for the prisoners is defrayed by the party in whose behalf the prisoner is confined; that is, if confined at the suit of the commonwealth, by the State, if at the suit of an individual in a civil cause, by such person, &c. (V. C. 1873, ch. 50, § 16 to 19; V. C. 1887, ch. 42, §§ 940, 941 &c.)

2^d. Liability of Jailer for Escape of Prisoners; w. c.

1^k. Jailer's *Civil* Liability for Escapes.

The jailor (*i. e.*, the sheriff) is liable *civilly*, at common law, for the escape of any prisoner confined on civil process, unless it occur by *act of God or of a public enemy*; and although at one time that liability was by statute in Virginia restricted to those cases where it was *expressly found* that the debtor escaped *with the consent*, or through the *negligence* of the officer (1 R. C. 1819, 550, ch. 136, § 3), yet that statute having been repealed (V. C. 1873, ch. 209, § 1), the common law is thereby restored. (Bac. Abr. Sheriff, (H.) 5; Id. (P.); Johnson v. Macon, 1 Wash. 5; S. C. 4 Call, 367; Insur. Co. of the Valley v. Bailey's Adm'r, 16 Grat. 384; Booth's Case, Id. 529; Stone v. Wilson, 10 Grat. 530.)

2^k. Jailer's *Criminal* Liability for Escapes.

This is confined, for the most part, to the jailor himself, not extending to the sheriff, unless he personally participated in it. (Bac. Abr. Sheriff, (H.) 4);

w. c.

1^l. Jailer's *Criminal* Liability for Escapes, where the Prisoner is in Confinement on a Charge or Conviction of Felony, and the Escape is *Voluntary*.

Jailer is guilty of felony, punished by penitentiary from two to ten years. (V. C. 1873, ch. 190, § 12; V. C. 1887, ch. 183, § 3752; Synops. Crim. Law, 152.)

2^l. Jailer's Criminal Liability for *all Negligent* Escapes, and for Voluntary Escapes, where the Prisoner is not Confined on a Charge or Conviction of Felony.

Jailer is guilty of a misdemeanor, punished by jail not more than *six months*, or fine \$50 to \$500. (V. C. 1873, ch. 190, § 12; V. C. 1887, ch. 183, § 3753; Synops. Crim. Law, 152.)

3^l. Mode whereby Jailer Transfers his Prisoners to his Successor.

By an *indenture* between himself and his successor, or by an entry upon the record of the county or corporation court, containing the names of the prisoners, with the causes of their commitment. (V. C. 1873, ch. 50, § 20; V. C. 1887, ch. 42, § 944; Bac. Abr. Sheriff, (1).)

3^h. Bailiffs; w. c.

1ⁱ. Bailiffs in England; w. c.

1^k. Bailiffs of Hundreds.

Bailiffs of hundreds are appointed by the sheriffs over the several *hundreds* in his county, to collect fines therein, summon juries, serve process, &c. (1 Bl. Com. 345; Bac. Abr. Sheriff, (H.) 4.)

2^k. Special Bailiffs.

Special bailiffs are bailiffs appointed by the sheriff to assist the bailiff of the hundred, or to execute process upon any certain occasion. (1 Bl. Com. 345-6; Bac. Abr. Sheriff, (H.) 4.) They are generally required by the sheriff to give a bond to indemnify him, and for that reason are styled *bound bailiffs* (*vulgice bum-bailiffs*). (1 Bl. Com. 346.)

2ⁱ. Bailiffs in Virginia.

It is supposed that the sheriff may, by special precept, appoint *special bailiffs* in Virginia to execute process upon any certain occasion. (Bac. Abr. Sheriff, (H.) 4.)

4^h. *Posse Comitatus*.

By the common law, the sheriff and his officers, and also every other person charged with the execution of writs of process, may summon the *posse comitatus*, or power of the county—that is, such a number of men as are necessary to aid him in executing writs, quelling riots, apprehending offenders, &c.; and all persons over fifteen, not aged or decrepit, are bound to obey his summons, under penalty of *fine and imprisonment*. (Bac. Abr. Sheriff, (N.) 2.) And this doctrine is not only affirmed in Virginia by statute, but provision is made for the sheriff's requiring the commandant of any regiment of militia in the county to call out such portion thereof to aid him as may be sufficient. (V. C. 1873, ch. 49, § 24; V. C. 1887, ch. 39, § 897.)

2^f. The Coroner.

See 1 Bl. Com. 346 & seq.; 3 Steph. Com. 30; 1 Tuck. Com. 49 & seq.; Bac. Abr. Coroner;

w. c.

1^g. The Antiquity and Original of the Office of Coroner.

The annotator of 1 Chit. Bl. 347, n. (23), in order to illustrate the ancient dignity of the coroner's office, cites Chaucer's description of the *Frankleyn*:

“At sessions ther was he lord and sire;
Ful often times he was Knight of the Shire;
A Shereve had he been, and a *Coronour*,
Was no wher swiche a worthy vavasour;”

And then refers to a remark of Selden (Tit. Hon. 2 and 3, § 4), that some copies have it *Coronour*, and other *Countour*, adding, "But the office of an *accountant* is perfectly inconsistent with the character described." The word *Countour*, however, signifies not an accountant, but a *pleader*—that is, a member of the legal profession, or sergent at law, which is surely not beneath the dignity of the *Frankleyn*. (Jac. Law, Dict. *Counter*; 3 Th. Co. Lit. 360; 10 Co. PREMI. XXXV.)*

The coroner's office is of equal antiquity with that of the sheriff, having been ordained, along with the latter, to keep the peace when the earls gave up the wardship of the counties. The coroner (lat. *Coronator*) is so called because he has chiefly to do with pleas of the Crown. Hence the chief-justice of the king's bench is the chief coroner of England, and may execute the office in any part of the realm. But there are also particular coroners in every county in England, usually four, but sometimes six, and in some instances a less number. (1 Bl. Com. 346-7; Bac. Abr., *Coroner*.)

2^c. The Modes of Appointing and Removing Coroners, and of Securing their Fidelity; w. c.

1^b. The Modes in England; w. c.

1ⁱ. The Mode of Appointing Coroners in England.

They have always been, and still are, chosen by all the freeholders in the county court, by virtue of the writ *de coronatore eligendo*, issued out of chancery, and they hold *durante bene placito*. (1 Bl. Com. 344; Bac. Abr. *Coroner*, (A).)

2ⁱ. Modes of Removing Coroners in England.

The office is determined, like that of sheriff, by the death of the incumbent, or by the election of a successor, by virtue of the writ *de Coronatore*, etc., which is issued by royal order whenever he neglects his duties, or when, in consequence of being chosen sheriff, or otherwise, he is disabled to perform them. (1 Bl. Com. 348; Bac. Abr. *Coroner*, (H.); 2 Hawk. P. C. ch. 9, §§ 12, 13.)

3ⁱ. Mode of Securing the Fidelity of the Coroner in England.

By his official oath, administered by the sheriff; and by the competent estate which the coroner was anciently required to possess, and for which the county is answer-

* NOTE. But though the function of an advocate be not beneath the *dignity of a Frankleyn*, it is hardly consistent with his character and position; and besides, in the same company was a "*sergeant of the law*," which makes it improbable that the Frankleyn or knight should be of the same profession. The editor, in Bell's edition of the *British Poets*, of Chaucer's *Canterbury Tales* (Tyrwhitt) suggests that *Countour* here means the foreman of the inquest in the hundred court, or possibly the steward of the court. (Vol. I., n. to line 364.)

able. (1 Bl. Com. 347; Bac. Abr. Coroner, (A.); 2 Hawk. P. C. ch. 9, §§ 6 to 8.)

2^b. The Modes of Appointing and Removing Coroners *in Virginia*, and of securing their fidelity; w. c.

1ⁱ. The Mode of Appointing Coroners in Virginia.

The county or corporation court nominates to the governor two persons residing in the county or corporation, one of whom the governor may appoint to be coroner, to hold office during good behavior; and if an additional coroner be needed, he may be appointed in like manner. (V. C. 1873, ch. 49, § 13; V. C. 1887, ch. 39, § 891.)

2ⁱ. Mode of Removing Coroners in Virginia; w. c.

1^k. The Causes for Removing Coroners.

The same as in case of sheriff, (*Ante*, p. 108, 1^k.)

2^k. The Mode of Proceeding to Remove Coroners.

The same as in case of sheriff, (*Ante*, p. 110, 2^k.)

3ⁱ. Mode of Securing the Fidelity of Coroners in Virginia; w. c.

1^k. The Oath of Office.

The same as in case of the Sheriff, (*Ante*, p. 110, 1^k.)

2^k. The Official Bond.

No bond seems required of the coroner, unless he is called on to act as the sheriff's substitute, in which case alone he has any concern with the money or property of others. The statute enacts that before he "shall receive any money or serve any execution, the court of his county or corporation shall take from him a bond in such penalty as it may deem sufficient," payable to the commonwealth, and conditioned for the faithful discharge of the duties of his office. (V. C. 1860, ch. 49, § 21; V. C. 1873, ch. 12, § 6; V. C. 1887, ch. 39, § 894; *Id.* ch. 13, §§ 177, 178.)

3^g. The Duties of Coroner; w. c.

1^h. The Duties of Coroner *in England*.

See 1 Bl. Com. 348-'9; Bac. Abr. Coroner, (C.); 2 Hawk. P. C. ch. 9, § 13 to 56;

w. c.

1ⁱ. Judicial Duties of Coroner in England; w. c.

1^k. Within what Places the Coroner has Jurisdiction.

He has jurisdiction everywhere within the realm, except within the *verge of the court* (there being a special coroner for the king's household), and except between high and low water mark, when the tide is up, for it is then a part of the *open sea*, and is under the jurisdiction of the admiralty. But he has no jurisdiction over the *open sea*, which designation includes such bays and inlets as are too wide to enable one standing on one side to see distinctly what is done on the other. (Bac. Abr. Coroner, (B.); 2 Hawk. P. C. ch. 9, § 14, 15, &c.)

2^k. Cases to which the Coroner's Cognizance Extends in England; w. c.

1^l. When any are Slain, Drowned, or Suddenly Dead or Wounded, or Die in Prison.

The coroner is to inquire by means of his jury of inquest concerning the manner of death.

See 1 Bl. Com. 348; Bac. Abr. Coroner, (C.); 2 Hawk. P. C. ch. 9, § 19.

2^l. In cases of *Treasure-Trove*.

The coroner by means of his jury is to inquire concerning *treasure-trove* (*i. e.* treasure found), who were the finders and where it is, and whether any one be suspected of having found and concealed a treasure.

See 1 Bl. Com. 349; Bac. Abr. Coroner, (C.)

3^l. In cases of Wrecks of the Sea.

It is a branch of the coroner's office also to inquire concerning shipwrecks which, like treasure-trove, belong by prerogative to the crown (*Ante*, 100-101); and certify whether wreck or not, and who is in possession of the goods.

See 1 Bl. Com. 349; Bac. Abr. Coroner, (C.)

4^l. In cases of Outlawry.

To pronounce sentence of outlawry, when the party has been five times exacted from county court to county court, without being arrested. (Bac. Abr. Outlawry, (E.) 4; 1 Hawk. P. C. ch. 48, § 26 & seq.) *Quæst.* if he does not act herein *ministerially*? (3 Bl. Com. 283; Synops. Crim. L. 230.)

3^k. Proceedings of Coroner in England, when Acting Judicially.

He conducts his inquiry, when acting *judicially*, by means of a jury of four, five or six men, who, on an inquiry of death, must be *sworn* by him *super visum corporis*, and not otherwise; but they may then be adjourned to a convenient place. In default of the coroner's acting, a justice of the peace may take the inquisition, which must always be *in public*, subject, however, to the judicial discretion of the coroner. (Bac. Abr. Coroner, (C.); 2 Hawk. P. C. ch. 9, § 19 & seq.)

2^l. The *Ministerial* Duties of Coroner in England.

He acts ministerially, merely as the sheriff's substitute, to execute process where the sheriff is a party, or otherwise so interested pecuniarily, or by partiality in respect to either party, as to disqualify him to act. (1 Bl. Com. 349; Bac. Abr. Coroner, (C.) and (F).)

2^h. Duties of Coroner in *Virginia*; w. c.

1^l. Judicial Duties of Coroner in Virginia; w. c.

1^k. Places within which the Coroner has Jurisdiction.

The Coroner's jurisdiction extends to all places within

his county or corporation, except to forts, magazines, arsenals, dock-yards, and other needful buildings, subject to the exclusive jurisdiction of the United States (U. S. Const. Art. I., § viii. 17); and except on the shore of the *ocean*, between high and low-water mark, when the *tide is in*. When the *tide is out*, he has jurisdiction over that space, as he has also over such navigable waters as are *infra corpus comitatus* within the body of his county. But he has no jurisdiction over the *open sea*, over which the admiralty courts (of the United States) alone have cognizance. (Bac. Abr., Coroner (C.); 2 Hawk. P. C. ch. 9, §§ 14, 15, &c.)

2^k. Cases to which the Coroner's Cognizance Extends in Virginia.

It exists where a death is "*supposed* to have been caused *by violence*, and *not by casualty*," to inquire when and by what means deceased came to his death. (V. C. 1873, ch. 197, § 1; V. C. 1887, ch. 192, §§ 3938, &c.; Crim. Synops. 207.)

The coroner with us has no cognizance of *wrecks*, provision being made to commit the care of them to one or more commissioners who are appointed by the Governor for each county bordering on the ocean or on Chesapeake Bay. (V. C. 1887, ch. 88, §§ 1938 & seq.; 3 Min. Insts. 40.)

It seems that in case of *treasure-trove*, as to which the commonwealth succeeds to the prerogative of the crown, the coroner's cognizance would remain as at common law. (3 Min. Insts. 39.)

In cases of *out-lawry*, whilst it existed in Virginia, the judgment was not pronounced by the coroner, but by the court of the county or corporation in which the prosecution is. (V. C. 1873, ch. 201, § 27.)

But by the code of 1887 it is enacted that no proceeding by outlawry shall hereafter be instituted or prosecuted. (V. C. 1887, ch. 196, § 4014.)

3^k. Proceeding by Coroner, when acting *judicially*, in Virginia.

"Upon notice of a death supposed to have been caused *by violence*, and *not by casualty*," he is required to issue a warrant to the sheriff or sergeant, or to any constable of his county or corporation, to summon *six jurors* to attend at a place and time named, "to inquire upon the view of the body of ———, there lying dead, when, how, and by what means, he came by his death." If the six jurors do not attend, the officer, or any other person, may be required to summon others. An oath is administered by the coroner, who may also summon witnesses, including physicians, and the evidence is reduced to

writing. If the jury, by their inquisition, accuse any one, the coroner is forthwith to commit him to jail, if present, and if not present, is to cause him to be arrested, and brought before a justice of the peace for commitment. If there be no coroner at hand, or he fails to perform his duty, a justice of the peace may act.

The jurors are to be *sworn* by the coroner, *super visum corporis*, and not otherwise; but they may then be adjourned to a convenient place. Hence, if the body cannot be found, or the remains are too much decomposed to afford any aid to the inquiry, the coroner has no jurisdiction.

The proceeding must always be *in public*, subject to the usual judicial discretion in the coroner; and although at common law, it could not take place on *Sunday* (which is *dies non juridicus*), yet, in Virginia, by statute, it may. (V. C. 1873, ch. 197, § 1 & seq.; V. C. 1887, ch. 192, § 3938, &c.; Id. § 3949; Bac. Abr. Coroner, (C.); 2 Hawk. P. C., ch. 9, § 19 & seq.; 3 Th. Co. Lit. 345, and n. (B) and (D); Id. 356; Hill's Case, 2 Grat. 612; Michie v. Michie, 17 Grat. 112.)

2ⁱ. Ministerial Duties of Coroner in Virginia.

These duties belong to him only as the sheriff's or sergeant's substitute, when there is no sheriff or sergeant, or deputy of either; or when for any cause it is not fit that a sheriff or sergeant should serve process or summon a jury. And if there is no coroner, or he too is interested, it may be done by a constable, or the court may appoint a crier to act, instead of either coroner or constable. (V. C. 1860, ch. 49, §§ 22, 23; V. C. 1873, ch. 49, § 23; V. C. 1887, ch. 39, §§ 893, 895, 896.)

4^g. Assistants whom Coroner may Employ.

From the silence of the English books, and from the fact that most of the coroner's duties are *judicial*, there would seem to have been *no deputy-coroner* at common law. In Virginia one might for a time have been appointed by the coroner, with the sanction of the county or corporation court (V. C. 1860, ch. 49, § 15); but that provision is repealed. (V. C. 1873, ch. 49, § 21, note *.) The county or corporation court, however, may in its discretion nominate to the governor an additional coroner. (V. C. 1887, ch. 39, § 891.)

3^d. Justices of the Peace; w. c.

1^g. The Antiquity and Original of Justices of the Peace; w. c.

1^b. The Antiquity and Original of Justices of the Peace in England.

The *office* originated at common law, but the persons holding it were merely *conservators of the peace*, and were

styled *custodes pacis*. They were elected by the freeholders in full county court.

By 1 Ed. III., c. 16, in order to prevent disturbances consequent on the murder of Edward II., the appointment was transferred to *the king*; by subsequent statutes of the same reign, they were clothed with the power, at sessions, to *take indictments*, and to *hear and determine misdemeanors and felonies*; and by 34 Ed. III., c. 1, received the appellation of *justices*.

Their commission, which is under the great seal, (1), appoints them all, jointly and severally, to keep the peace, by arresting, binding over, &c.; and (2), any two or more to inquire of and determine felonies and misdemeanors, with a *proviso* that some particular justices by name should always be present (*quorum aliquem vestrum A, B, C, D, &c., unum esse volumus*); whence the justices so named (who at first were only those most eminent for skill and discretion), are said to be of the *quorum*. (1 Bl. Com. 349 & seq.; Bac. Abr. Justices, (A.), (B.) and (C.).)

2^h. Antiquity and Original of the Office of Justice of the Peace in Virginia.

At one of the first regular General Assemblies ever held in Virginia (A. D. 1623), courts were directed to be kept once a month in the *corporations* of Charles City and Elizabeth City counties, to decide controversies not exceeding in value 100 *pounds of tobacco*, and to punish petty offences, the judges being the *commanders of plantations* (*i. e.* settlements), and such others as the governor and council should unite in commission with them, with an appeal to the governor and council. (1 Hen. Stats. 125, 133.)

In 1631, "*Commissioners*" were named to hold monthly courts, not only for the former counties of Charles City and Elizabeth City, but also for those of "Henrico, Warwick River, Warrosquyoake, and Accawmacke," with jurisdiction of suits not exceeding the value of £5 sterling, and of petty offences, and the same power as justices of the peace in England. (1 Hen. Stats. 168-'9.)

In 1642, commissioners were directed to hold "*county courts*" in the counties above named, and "James City, Isle of Wight (Warrosquyoake was changed to Isle of Wight in 1637, 1 Hen. Stats. 577), Upper Norfolk, Lower Norfolk, York and Northampton," with a jurisdiction limited to 1,600 pounds of tobacco, and an individual cognizance to the commissioners, under the value of 20 shillings sterling, or 200 pounds of tobacco. (1 Hen. Stats. 272-'3.)

They were not called *Justices of the Peace* until 1661-'2. (3 Hen. Stats. 89.)

Upon the occurrence of the revolution in 1776, it was provided that justices of the peace should be appointed

by the governor and council, upon the recommendation of the county court; and so it remained until the constitution of 1851, which made them *elective by the people*, as they still are. (Va. Const. 1869.)

2^g. The Mode of Appointment and of Removal of Justices of the Peace, and also of Securing their Fidelity; w. c.

1^h. Mode of Appointment and of Removal of Justices of the Peace in *England*, and of Securing their Fidelity; w. c.

1ⁱ. Mode of *Appointment* of Justices of the Peace in England.

By the royal commission, under the great seal. (1 Bl. Com. 351; 3 Steph. Com. 39 & seq.)

2ⁱ. Causes and Modes of *Removal* of Justices of the Peace in England; w. c.

1^k. By the Demise of the Crown, or by any Manifestation of the King's Pleasure.

1 Bl. Com. 353; 3 Steph. Com. 42.

2^k. Acceptance of an Incompatible Office.

e. g. that of Sheriff, &c. (1 Bl. Com. 353.)

3^k. Non-user, Mis-user, &c.

Bac. Abr. Offices, (M.).

3ⁱ. Security for *Fidelity in Office* of Justices in England.

The oath of office, and the possession of an *estate in lands of at least £100 annual value*. (1 Bl. Com. 352-'3;

Bac. Abr. Justice, (D.).)

2^h. Mode of *Appointment* and of *Removal* of Justices of the Peace in *Virginia*, and also of *Securing their Fidelity*; w. c.

1ⁱ. Mode of *Appointment* of Justices of the Peace in Virginia.

Every county is divided into as many compactly located "*magisterial districts*" as may be necessary, not less than three, and after three have been formed, containing not less than thirty square miles, each district to have a certain name by which it may sue and be sued. Three justices are elected in each district by the voters thereof, to serve two years. (Va. Const. 1869, Art. VII. § 2; Amendment 1874.)

The mayor, recorder and aldermen of *every incorporated town*, and the mayor, members of the council, and trustees in towns with a population under 5,000, have also the power of justices of the peace. (V. C. 1873, ch. 48, § 13. V. C. 1887, ch. 44 § 1033.)

2ⁱ. Mode of *Removal* of Justices in Virginia; w. c.

1^k. Causes of *Removal* from Office of Justices.

The same causes as for the removal of Sheriff. (1 *id.*,

p. 108 (1st ed. p. 93) 1^k; Sherrard's case, 4 Leigh, 643;

Tate's case, 3 Leigh, 802; Chew v. Spottsylvania Jus-

tices, 2 Va. Cas. 208; Poulson v. Accomac Justices, 2

Leigh, 743; Fugate's Case, 2 Leigh, 724; Mann's Case,

1 Va. Cas. 138: Alexander's Case, Id. 156; Synops. Crim. Law, 145 to 148.)

- 2^k. Mode of Proceeding in Order to Remove Justices from Office.

The same as in case of sheriff. (*Ante*, p. 110 (1st ed. p. 93) 2^k.)

- 3ⁱ. Modes in Virginia of *Securing Fidelity* in office of Justices of the Peace.

The oaths of office. These are the same as in the case of sheriff (*Ante*, p. 110 (1st ed. p. 94), 1^k), and to act before taking them, subjects the offender to a forfeiture of from \$100 to \$1,000. (V. C. 1873, ch. 12, §§ 9, 5; V. C. 1887, ch. 13, §§ 1681-70, 182.)

- 3^g. The Duties of a Justice of the Peace; w. c.

- 1^b. The Duties of a Justice of the Peace in *England*.

The duties of a justice of the peace in England are believed to be properly *judicial* in all cases, although *it is said* he acts only *ministerially* in preserving the peace, and in causing malefactors to be apprehended, and their appearance secured. And certain it is that a justice is not liable to a *private action* for any wrong that he may commit, even maliciously, save when he acts ministerially, although by leave of court he may be prosecuted *criminally* if he act *corruptly* in those cases where he hears and determines *as a judge*. (1 Bl. Com. 354, and notes; 3 Steph. Com. 43-4; Bac. Abr. Justices, &c. (E.); 5 Burns' Just. 52, 56 & seq.; 1 Chit. Gen. Pr. 128; 2 Hawk. P. C. ch. 8, § 74; Id., ch. 13, § 20; Cooley on Torts, 403 & seq.)

Judge Cooley points out with great force and distinctness the reasons why public policy forbids, in all cases, a private action against a judicial officer for the manner in which he discharges his judicial functions. (Cool. Torts, 405 & seq.)

- 2^h. The Duties of a Justice of the Peace in *Virginia*.

The duties of a justice of the peace in Virginia are also principally, if not exclusively, *judicial*, but subject to the qualification noted (*Supra*, 1^h) as existing in England, and also to certain other qualifications named, *infra*, under 7ⁱ, 8ⁱ, and 9ⁱ. They act always *singly*, and although formerly, in certifying acknowledgments, &c., of married women, two were required to act together, it is not so now. (V. C. 1887, ch. 111, § 2502.) The acting justice, however, may call others to his aid as his advisers; but the *action and the responsibility are his*.

The judicial functions of a justice are as follows:

- 1ⁱ. To Keep the Peace.

And, therefore, to bind over by recognizance such as threaten to break it, to suppress riots, &c., as at common law, at least substantially. (V. C. 1873, ch. 196, §§ 1 & seq.; Id. ch. 205, §§ 4 to 13; V. C. 1887, ch. 191, §§ 3912, &c.,

&c.; Id. ch. 200, §§ 4092-4102; Synops. Crim. L. 204 & seq.)

- 2ⁱ. To issue Warrants, to *Arrest and Commit Felons*, and other Lesser Offenders, or bind them in Recognizance to Answer.

See V. C. 1873, ch. 199, § 1 & seq.; V. C. 1887, ch. 194, §§ 3955, &c.; Synops. Crim. L. 214 & seq.

- 3ⁱ. To issue Warrants to Search for Things Stolen, Counterfeit Coin, etc.; Obscene Books, etc.; Lottery Tickets, etc., or Gaming Apparatus; and to Arrest the Offenders.

See V. C. 1873, ch. 198, §§ 1, &c.; V. C. 1887, ch. 193, §§ 3951, &c.; Synops. Crim. L. 217-18.

- 4ⁱ. To act in place of the Coroner in holding Inquests.

See V. C. 1873, ch. 197, § 11; V. C. 1887, ch. 192, § 3948.

- 5ⁱ. To try, in a summary way, such minor offences as are punished only by fine, which *cannot exceed* \$20; or cases of assault and battery not felonious; or cases of petit larceny, and certain others.

See V. C. 1873, ch. 40, §§ 1, 2, 3; Id. ch. 147, § 1; Id. ch. 48, §§ 8, 9; V. C. 1887, ch. 31, §§ 712, 714; Id. ch. 140, § 2939; Id. ch. 201, §§ 4106, &c.; Synops. Crim. L. 210, & seq.

The provision conferring upon justices of the peace an enlarged criminal cognizance is as follows, namely:

“Justices of the peace, in addition to the jurisdiction now exercised by them as *conservators of the peace*, shall have concurrent jurisdiction with the county and corporation courts of all cases occurring within their jurisdiction of—

“Assault and battery, *not felonious*;

Petit larceny;

Unlawful or malicious trespass;

Lewd and lascivious cohabitation;

Adultery;

Fornication;

Keeping house of ill-fame;

Cruelty to animals;

Disturbance of public worship;

Carrying dangerous weapons to a place of worship or on Sunday at any place;

Carrying concealed weapons;

Selling spirituous liquors, &c., within three miles of a camp-meeting, &c.; and

Obstructing highways and bridges;

“In all which cases the punishment may be the same as the said courts are authorized to impose by the existing laws; but with a right of appeal to the county or corporation court. And the accused is there entitled to trial by jury empanelled in the same way as in like cases originating in said court. (V. C. 1887, ch. 201, §§ 4106, &c.)

6. To try Civil Causes of Small Value.

A justice of the peace has power in *civil cases* to try any claim to specific *personal* property, or to any debt, fine, or other money, or to damages for breach of any contract, or for any injury done to property, real or personal, which would be recoverable by action at law or suit in equity, *provided* that when the claim is to a fine, or damages for breach of any contract, or for injury to property, real or personal, the amount of such claim do not exceed \$20, (exclusive of interest), and provided in other cases, the claim do not exceed \$100, (exclusive of interest), but in every case where the amount or thing in controversy exceeds the sum or value of \$20, the justice, upon the application of the defendant, and upon affidavit that he has a substantial defence thereto, may at any time *before trial*, remove the cause and all the papers thereof to the court of the county or corporation wherein the warrant has been brought, and the clerk of such court shall forthwith docket the same. But it shall not be tried at any term, except by consent, unless it has been so docketed ten days previous thereto. And on such trial the proceedings shall conform to § 3211, where a motion, on fifteen days' notice, is prosecuted to recover money on *any contract*. (V. C. 1887, ch. 140, § 2939; Id. ch. 156, § 3211.) Nor does it constitute any bar to the cognizance by the justice, that the claim is for or against the town or county, in which such justice resides. (V. C. 1887, ch. 140, § 2939.)

There is yet another case remaining to be mentioned, which is cognizable before a justice, namely, where the possession of a tenement is unlawfully detained by a tenant or some person claiming under him, the lease of such tenant having been originally for a period *not exceeding one month*. (V. C. 1887, ch. 123, §§ 2716 & seq.)

See also *Miller v. Marshall*, 1 Va. Cas. 158; *Warwick v. Mayo, Mayor*, 15 Grat. 541 to 543.

The remaining duties of a justice are *ministerial*, namely:

7ⁱ. To issue Warrants upon Application of an Overseer of the Poor to Remove a Pauper, etc.

See V. C. 1873, ch. 51, § 16; V. C. 1887, ch. 28, § 878.

8ⁱ. To Take and Certify Acknowledgments of Conveyances, etc., for Registry, and also Affidavits and Depositions.

See V. C. 1873, ch. 117, § 3; Id. ch. 48, § 5; Id. ch. 172, § 29; V. C. 1887, ch. 111, § 2501; Id. ch. 132, § 3500; Id. ch. 164, § 3359.

9ⁱ. To Take and Certify the Acknowledgment of a Married Woman.

See V. C. 1873, ch. 117, § 4; V. C. 1887, ch. 111, §§

2502, &c.; 2 Min. Insts. 867; *Thruston v. Thruston*, 2 H. & M. 132; *Manns v. Givens*, 7 Leigh, 705.

A question has been made whether the taking the acknowledgment of a married woman is not a *judicial* act, rather than a ministerial one, and sundry *dicta* of eminent judges are cited to that effect, as in *Davis v. Sims*, Va. Law Jour. May, 1881, p. 321 '2; *Davis v. Beazley*, 75 Va. (1 Matt.) 591; *Natl Bank v. Conway*, 1 Hughes, 44 '5; and also the confessedly conclusive character of the certificate, where no fraud is imputed to the authorities. It is not perceived, however, how, if the function were judicial, it can be conferred on the clerk of the court of registry, or on a notary public or a commissioner in chancery, or on a foreign minister of the United States, or on the mayor of a foreign city, the Constitution of Virginia having defined accurately the persons who are to exercise the judicial power, and has specially prohibited one department of the government to exercise the powers belonging to either of the others. (Va. Const. Art. II., VI.) The conclusive character of the certificate does not depend, it is conceived, upon the act being *judicial*, but upon its being a *record*. (*Carper v. McDowell*, 5 Grat. 233.)

4^f. Constables; w. c.

1^a. The Antiquity and Original of the Office of Constable; w. c.

1^b. The Antiquity and Original of the Office of Constable *in England*.

There are various officers so called, namely, the Lord High Constable of England (now extinct), the constable of the hundred, sometimes styled *high constable*, and the constable of the *ville*, township or manor, generally called *petty constable*. The name, which was first bestowed upon the most eminent, is said to be derived from the Latin, *comes stabuli*, because the Lord High Constable of England was leader of the king's armies, and had cognizance of whatever pertained to arms, war, or *knighthood*.

The other two classes of constables are very ancient, more ancient perhaps than the Conquest, according to Lord Coke, going back (under the designation of *head-borough*, *boroughs-ealder*, or *borsholder*), to the *institution of the frank-pledge* by Alfred. No mention, however, of such an officer as *constable*, at least by that name, occurs earlier than 36 Hen. III. (A. D. 1252), when a writ is preserved providing for the appointment of a *chief constable* in every hundred, and in every township, ville, or village, a *petty constable*, or two, according to the number of the inhabitants, for the *conservation of the king's peace*. (1 Bl. Com. 355, &c.; Bac. Abr. Constable, (A.); Jac. Law. Diet. Constable; 2 Hawk. P. C. ch. 10, § 33 '4; Burns' Just. 644.)

2^b. The Antiquity and Original of the Office of Constable *in Virginia*.

Constables were recognized by the statutes of Virginia so early as 1643 (when they seem to have been already well known officers), being required to present to the "commissioners of the monthly courts" such as failed to plant two acres of corn for each laboring person. (1 Hen. Stats. 246.) Various other acts previous to the Revolution imposed sundry duties upon them, besides their principal common law duty as conservators of the peace; *e. g.*, by act of 1730, to see to the destruction of *tobacco suckers*, in order to improve the staple of tobacco (4 Hen. Stats. 242); by act of 1748, to suppress unlawful meetings of slaves (5 Hen. Stats. 109); and by act of 1755, to convey deserters to the commands where they belong (6 Hen. Stats. 563).

By the Constitution of 1776 (Art. XV.), constables were directed to be "appointed by the justices," which seems to have been the usage from the beginning, without the aid of any statute, by analogy to the sheriff's *tourn* or *leet* in England. (Hen. Just. 245.) And they continued to be appointed by the justices (*i. e.*, the county and corporation courts) until by the Constitution of 1851 (Art. VI. § 30), in an evil hour, they were ordered to be *elected by the voters* in the several magisterial districts, as they also are by the Constitution of 1869 (Art. VII. § 2).

2^c. Mode of Appointment and Removal of Constables, and of Securing their Fidelity; *w. c.*

1^a. Mode of Appointment and Removal of Constables, and of Securing their Fidelity *in England*; *w. c.*

1ⁱ. Mode of *Appointment* of Constables in England.

High, or *chief constables* of hundreds, are appointed, it would seem, by the sheriff's *tourn*, or in default of that, by the justices, at their *special sessions* for the several divisions of the county. (2 Hawk. P. C. ch. 10, § 37; 1 Bl. Com. 355; 3 Steph. Com. 47.)

Petty constables of vills, &c., were formally chosen *by the jury*, at the court-leet for the *decennary* or *tithing*, or if no court-leet be held, by *two justices*; but by 5 and 6 Vict. c. 109, the appointment is made in all cases by the justices, at *special sessions*. (1 Bl. Com. 356; 3 Steph. Com. 48-9.)

2ⁱ. Mode of *Removal* of Constables in England.

At common law a chief constable was removable by the sheriff, as the judge of *tourn*, and a petty constable by the steward, as judge of the *court-leet*. By Statutes 5 and 6 Vict. c. 109, the petty constable continues in office *a year*, and until his successor is appointed, and it would seem is removable by the *special sessions*. Both classes may doubtless be removed for the same general causes as

sheriffs in Virginia (*Ante*, pp. 108, 110, 1^k, 2^k). (2 Hawk. P. C., ch. 10, § 38; 3 Steph. Com. 49.)

3ⁱ. Mode of *Securing Fidelity* of Constables in England.

By oath of office, which now defines pretty clearly the constable's duty. (3 Steph. Com. 49; 1 Burns' Just. 653.)

2^h. Mode of Appointment, and of Removal of Constables, and of Securing their Fidelity in *Virginia*; w. c.

1ⁱ. Mode of *Appointment* of Constables in Virginia.

A constable is elected *by the voters* in each magisterial district, on the fourth Thursday in May, to serve *two years* from first of July ensuing. (Va. Const. 1869, Art. VII., § 2; Amendments 1874.)

2ⁱ. Mode of *Removal* of Constables in Virginia.

The causes and modes of removal are the same as in case of sheriffs (*Ante*, pp. 108, 110, 1^k, 2^k); V. C. 1873, ch. 49, § 15; V. C. 1887, ch. 9, §§ 96, 97.

3ⁱ. Modes of *Securing Fidelity* of Constables in Virginia; w. c.

1^k. The Oaths of Office.

The same as in case of the sheriff (*Ante*, pp. 110, 1^k); V. C. 1873, ch. 12, § 1; V. C. 1887, ch. 13, §§ 168 & seq.)

2^k. Official Bond.

To be executed when the constable qualifies, by taking the oaths before the judge of the circuit or county court of his county (or in a corporation, before the city judge), in term time or vacation, in a penalty of not less than \$2,000, with surety deemed sufficient by the court or judge, payable to the Commonwealth of Virginia, and recorded in the county (or city?) court. (V. C. 1873, ch. 49, § 16; *Id.* ch. 13, § 6; V. C. 1887, ch. 35, §§ 812, 814; *Id.* ch. 13, § 177.)

3^g. The Duties of a Constable; w. c.

1^h. The Duties of a Constable in *England*.

To *keep the peace* within his district, for which purpose he is armed with large powers of arresting and imprisoning, &c.; to present at the *town or lect*, all persons guilty of offences inquirable therein; and to be the *ministerial officer* of the justices of the peace. He is said to have power to appoint a deputy in case of necessity (his duty being wholly *ministerial*), although it can seldom be needful, as a justice may, if occasion require, appoint a special constable. (1 Bl. Com. 356; Bac. Abr. Constable, (C.) & (D.); 2 Hawk. P. C. ch. 10, § 34 to 36, 49, & n. (4).)

2^h. The Duties of a Constable in *Virginia*; w. c.

1ⁱ. As *Conservator* of the Peace.

The constable is empowered, by virtue of his common law authority, to keep the peace, and may exercise for that purpose the same powers as at common law, unless forbidden by statute. It is furthermore his duty, as well as that of the sheriff and other officers, to give informa-

tion of the violation of any penal law, to the attorney for the commonwealth, in order that proceedings may be instituted. (1 Bl. Com. 356; Bac. Abr. Constable, (C.); 2 Hawk. P. C. ch. 10, § 34; V. C. 1873, ch. 161, § 8; V. C. 1887, ch. 195, § 3988.)

Sergeants of corporate towns, whose population is under 5,000, and which have a mayor and council, or board of trustees, have the powers of constables. (V. C. 1873, ch. 49, § 8; V. C. 1887, ch. 39, §§ 895, 896.)

2ⁱ. As *Ministerial Officer* of Justices of the Peace, or of the Coroner.

e. g. In serving summons on defendants, (V. C. 1873, ch. 147, § 2; V. C. 1887, ch. 140, § 2940; Id. §§ 2941, 2948, 2954); subpoenas for witnesses (Id. § 3); executions on judgments (Id. § 9); writs of interpleader (Id. § 14); attachments (Id. ch. 148, § 6; V. C. 1887, ch. 141 § 2965); distress-warrants (Id. ch. 134, § 10; V. C. 1887, ch. 127, § 2790); arrests on criminal charges (Id. ch. 199, § 2, &c.); arrests upon demand of surety of peace, &c. (V. C. ch. 196, §§ 2, 3 & seq.; V. C. 1887 ch. 191 §§ 3914 &c.); search-warrants (Id. ch. 198, §§ 1, 3; V. C. 1887, ch. 193, §§ 3951, 3952, 3953); coroners' juries of inquest (Id. ch. 197, § 10 V. C. 1887, ch. 192, § 3938; Bac. Abr. Constable, (D.); 2 Hawk. P. C. ch. 10, § 35; 1 Burns' Just. 659 & seq.)

5^f. Surveyors of Highways; w. c.

The doctrine relating to surveyors of highways may be arranged under the heads following, namely: (1), The antiquity and original of the office; (2), The mode of appointment and removal, and of securing the fidelity of surveyors; (3), The duties of surveyors; (4), The establishing or altering of roads or landings; (5), The building of bridges or causeways; (6), The discontinuing of roads and landings; w. c.

1^c. Antiquity and Original of the Office of Surveyor of Highways; w. c.

1^h. Antiquity and Original of the Office of Surveyor of Highways in England.

By the common law, *the parish* was bound to keep the *highways* within its limits in repair, whilst *bridges* were built and repaired at the expense of the *county*. But, although the parish was and is liable to indictment for neglect of its duty in this respect, it was not incumbent on the church-wardens, nor on any particular officer, to call the parish together, and set them to work, until 2 & 3 Ph. & Mary required surveyors of highways to be chosen for every parish by the constable and church-wardens, their duties being regulated by several subsequent statutes, especially by 5 & 6 Wm. IV., c. 50, and 4 & 5 Vict. c's 51, 59. (1 Bl. Com. 357-'8; 3 Steph. Com. 260-'61; Bac. Abr. Highways, (A).)

2^h. Antiquity and Original of the Office of Surveyor of Highways in Virginia.

The earliest act touching the opening or care of highways is in 1632. It provides that "*highways shall be layd out in such convenient places as are requisite, as the governour and counsell, or the commissioners for the monthlie courts shall appoint, according as the parishoners of every parish shall agree.*" (1 Hen. Stats. 199.) And in 1657 it was enacted that "surveyors of *highwaies*, and maintenance for bridges, be yearly kept and appointed in each *countie* court respectively, and that all general *waies* from county to county, and all church *waies*, be *laied out and cleered yearly* as each county court shall think *fitt*, needful, and convenient, respect being had *to the courses used in England to that end.* (1 Hen. Stats. 436.) By act of 1661, the county courts were required annually to appoint surveyors, who, through the vestries of the several parishes, should call out the laboring men to do the work as required by the surveyors. (2 Hen. Stats. 103.) And in 1705, the law took substantially the shape it has since, until recently, retained, the public roads being divided into precincts, to each of which a surveyor was annually assigned by the county court, the labor being supplied from the male laboring persons that were *tithable*, *i. e.* such as were over sixteen. (3 Hen. Stats. 258, 392.)

2^g. Mode of Appointment and of Removal of Surveyors of Highways, and of Securing their Fidelity; w. c.

1^h. Mode of Appointment and of Removal, and of Securing the Fidelity of Surveyors of Highways, *in England*; w. c.

1ⁱ Mode of *Appointment* of Surveyors in England.

Surveyors of highways were originally appointed by the constable and church-wardens of the parish, and more recently (by 5 & 6 Wm. IV., c. 50, and 4 & 5 Vict. c's 51, 59) are elected annually, by the inhabitants of the parish, in vestry assembled. (1 Bl. Com. 658; 3 Steph. Com. 261.)

2ⁱ. Mode of *Removal* of Surveyors of Highways in England.

In like manner as sheriffs in Virginia. (*Ante* p. 108 (1st ed. p. 92), 2ⁱ.)

3ⁱ. Mode of *Securing Fidelity* of Surveyors in England.

It would seem only by the general penalties for official malfeasance and non-feasance. (3 Steph. Com. 262.)

2^h. Mode of Appointment and of Removal of Surveyors of Highways in Virginia, and of Securing their Fidelity; w. c.

1ⁱ. Mode of *Appointment* of Surveyors of Highways in Virginia.

The court of each county is required to divide into precincts all the county roads not kept in order under

any contract, and, as often as it pleases, may appoint a surveyor for each precinct, who holds his office until another is appointed in his stead; but after two years he may give up his office, if his road be in good order, and cannot be again appointed, without his consent, within two years thereafter. (V. C. 1887, ch. 43, §§ 1005, 1006.) The county court, whenever it shall deem it necessary, may appoint not less than three, nor more than five *resident, freeholders*, to examine existing roads, and routes for new roads, who shall report to the court as to the expediency of altering old or opening new roads, or of building or repairing any bridge. (V. C. 1887, ch. 43, §§ 945, &c.)

2ⁱ. Mode of *Removal* of Surveyors of Highways in Virginia.

The causes and modes seem to be essentially the same as in case of sheriffs. (*Ante* pp. 108, 110 (1st ed. 93), 1^k and 2^k.) But as the county court may remove them at pleasure, the more formal methods will be seldom used.

3ⁱ. Mode of *Securing the Fidelity* of Surveyors of Highways in Virginia.

By the oaths of office, as in case of sheriff, (*Ante*, p. 110 (1st ed. p. 94), 1^k); by the penalties for malfeasance and nonfeasance, *at common law*, viz., forfeiture of office and fine; and by the penalty denounced by the statute, namely, a fine of from \$5 to \$30. (Bac. Abr. Offices, (N.); 1 Th. Co. Lit. 238 '9, and n. (L.); V. C. 1887, ch. 43, § 1012.)

An additional security for the fidelity of surveyors of highways is provided by a recent statute empowering the board of supervisors of every county to appoint what the statute styles a "*Road Surveyor*," but who might more properly be designated a *Road Superintendent*, for each *election district* in the county. He is required to be a resident and voter therein; and it is his duty to direct the repairs and the keeping in order of all county roads and bridges within his district under the regulations prescribed by the board of supervisors. (V. C. 1887, ch. 43, §§ 963, 964; Id. §§ 975 to 977.)

3^g. Duties of Surveyors of Highways; w. c.

1^b. Duties of Surveyors of Highways in England.

To keep the highways in repair, to remove obstructions and nuisances, and to set up guide posts, etc. (1 Bl. Com. 358; 3 Steph. 262, &c.)

But in later years, most of the great roads of England have been made, and are kept in repair, under *turnpike acts*, whereby certain commissioners are empowered to construct the road, and to institute tolls in order to reimburse themselves, and to defray the cost of keeping the

roads in good condition. (1 Bl. Com. 359; 3 Steph. Com. 266 & seq.)

2ⁿ. Duties of Surveyors of Highways in Virginia.

To superintend the roads in his precinct, and to cause them to be kept cleared, smoothed of rocks and obstructions, of the necessary width, (usually thirty feet), well drained, and otherwise in good order, and secure from the falling of dead timber; to erect sign boards at the forks and crossings; across every stream, where it is necessary and practicable, to place a bridge, or at least a bench or log, for foot passengers; to construct causeways where needful and practicable; and to keep both bridges and causeways in as good order as the means in his power will permit; to open new roads and landings, and alter old ones; to collect the *road-taxes and fines*; and to render to the county court *annually* an account of his receipts and disbursements. (V. C. 1887, ch. 43, §§ 1007, 1011.)

W. C.

1ⁱ. Means Provided for Keeping the Public Roads in Repair, etc.

The means principally relied upon to open new roads, and to keep existing ones in repair, are the *labor of the country*—that is, of all male persons (with some exceptions) between the ages of sixteen and sixty years. This, to be sure, is, to a trifling extent, eked out by the fines assessed upon delinquents, which are at the rate of seventy-five cents for each day of failure to work when required by the overseer. But where the surveyor of any precinct is unable with the means and labor at his disposal to keep the road in good order, he may be authorized by the county court to hire labor for the purpose, and the expense is to be paid out of the county fund. (V. C. 1887, ch. 43, §§ 1009, 1010, 979-981.) And the making, improving, or keeping in order any road, or part of a road, may, in the discretion of the court, be let out to contract, the expense being defrayed out of the county levy. (V. C. 1887, ch. 43, §§ 991 to 996.)

W. C.

1^k. Road-labor.

All males between sixteen and sixty years, in each road district, are appointed to work on some public road therein, except the residents in towns which provide for their own poor and keep their streets in order, ministers of the gospel, and persons disabled. The penalty for failure is seventy-five cents per day, which is to be applied to the roads. (V. C. 1887, ch. 43, §§ 979 to 981; *Id.* 1009, 1010.)

2^k. Materials Needed for Roads, etc.

Wood, stone, gravel or earth necessary in constructing

or repairing any road, bridge, or causeway, may be taken by the overseer from any *convenient* lands, or a ditch for draining the road may be cut through *adjoining* lands (provided it be not a lot in a town, a yard or garden); the damage done, if desired, to be estimated by three sworn freeholders, under a warrant from a justice, and included by the board of supervisors in the next county levy. (V. C. 1887, ch. 43, §§ 985, 986.)

3^k. Account by Overseer for Fines and Expenses Incurred.

He must account *annually* to the county court for the fines collected and expended, showing the amount paid in money, and in labor, teams, etc., respectively; and the amount, in his opinion, required to keep his road in order for the ensuing year. And he is entitled to compensation at the discretion of the county court, to be paid out of the county levy, not exceeding one dollar per day for the time actually employed *in summoning hands to work on the road*. (V. C. 1887, ch. 43, § 1011.)

2ⁱ. Modes of Redress, if Roads are not kept in Repair, etc.

The *overseer* is supposed to be punishable, as at common law, for any neglect of his duty, by fine and imprisonment (Bac. Abr. Offices, (N).; 1 Th. Co. Lit. 238-'9, and n. (I, 1.); and the statute imposes, for any failure to perform what the law requires from him, a fine of not less than five nor more than thirty dollars. (V. C. 1887, ch. 43, § 1012.)

4^g. The Establishing or Altering of Roads or Landings; w. c.

1^h. What Power may Establish or Alter Roads or Landings.

The power belongs to the *county courts*, to be exercised at their *discretion*, upon their own motion, or when called forth by the *application* of individuals. (V. C. 1887, ch. 43, §§ 945, 947, &c.)

2^h. The Method of Proceeding to Establish or Alter a Road or Landing.

The method, in case of a *landing*, is in general the same as in case of a *road*. For brevity's sake, the statement is applied to *roads only*. (V. C. 1887, ch. 43, §§ 947, &c., 954.) w. c.

1ⁱ. Where the whole Road is in *one County*; w. c.

1^k. Preliminary Examination by a Commissioner of Roads, or by Viewers, and their Report.

The county court, upon its *own motion*, or upon the *application of any person*, may direct three or more *viewers* (who it is said need not be *sworn*), to view the ground and report to the court the conveniences and inconveniences that will result, as well to individuals as to the public, if such road shall be as proposed, and especially whether it will invade any yard, garden or orchard. The viewers shall, besides these particulars, report also the

facts, in their opinion, useful in determining the judgment of the court; compare the route proposed with other routes, with the reasons for preferring either; state the names of the landholders, which of them require compensation, and the probable amount; and return, with their report, a map or diagram of the route, employing a surveyor if necessary. (V. C. 1887, ch. 43, §§ 989, 990; *Clarke v. Mayo*, 4 Call. 374; *Fisher v. Smith*, 5 Leigh, 611; *Crenshaw v. Patterson*, 6 Leigh, 457; *Lewis v. Washington*, 5 Grat. 265; *White v. Coleman*, 6 Grat. 138; *Mitchell v. Thornton*, 21 Grat. 164.)

2^k. Summoning the Land-owners to Show Cause against Establishing or Altering the Road.

Upon this report, unless the opinion of the court be adverse to the establishment or alteration of the road, it shall summon the land-owners concerned to show cause against it; and then, if the court has enough before it to fix upon a just compensation to them, and they are willing to accept it, it may determine the matter without further proceedings. Otherwise it is to appoint five-disinterested freeholders of the county (any three of whom may act), for the purpose of ascertaining a just compensation for the lands to be used for the road. (V. C. 1887, ch. 43, §§ 950, 951.)

3^k. Tenor of the Proceedings by the Commissioners.

The commissioners are to meet on the lands in question, at a certain place and day, to be named in the order of court appointing them, of which the sheriff shall give notice to the land-owners, and after being sworn, shall ascertain, agreeably to V. C. 1873, ch. 56, §§ 9 and 10 (V. C. 1887, ch. 46, §§ 1077, 1078), what will be a just compensation to each proprietor for his land proposed to be taken, and for the damage to the residue of his tract beyond the *peculiar benefit* which will be derived in respect to such residue from the road: and this inquest, *signed* by the commissioners, the latter must return to the court, along with the certificate of their oath. But if the sum allowed by the commissioners is not more than that previously proposed by the court, the land-owner is to pay the cost occasioned by the order appointing the commissioners. The commissioners are also required to report to court whether the road will be one of such mere private convenience as to make it proper that it should be opened and kept in order by the person or persons for whose convenience it is desired. (V. C. 1887, ch. 43, §§ 953, 955; V. C. 1873, ch. 56, §§ 9, 10; V. C. 1887, ch. 46, §§ 1077, 1078; *Atto. Gen. v. Turpin*, 3 Hen. & M. 448; *Jas. River & Ka. Co. v. Turner*, 9 Leigh, 313; *Muir v. Falconer & als.*, 10 Grat. 12.)

4^k. Sentence or Order of Court.

Upon the report of the viewers, the report of the special commissioners, and other evidence, if any, the court shall determine whether the road shall be established or altered as proposed, or not; and if it determines to establish or alter it, the county is chargeable with the compensation to the proprietors or tenants, with such costs as the court may allow the applicants, and the costs of the commission, except where the sum allowed by the viewers to any land-owner is not more than the court, before appointing the special commissioners, had consented to allow him, in which case he is adjudged to pay the costs of the commission. (V. C. 1887, ch. 43, §§ 953, 955.) And when it shall appear to the court that the establishment or alteration of the road will be for mere private convenience, the court may either decline to establish or alter the road, or may order the establishment or alteration of it, upon the condition of the applicant's paying, in whole or in part, the compensation to the land-owners, the costs of the proceeding, and of keeping the road in order. (*Linkinhoker v. Graybill*, 80 Va. 835). And the road is not to be established or altered until such compensation and costs are paid, or the written consent of the land-owners given. And when the court decides to establish or alter any road, or to build, repair or alter any bridge, where the gross expenditure chargeable to the county will exceed \$30, before ordering the road, bridge, alteration or repairs, the court is to determine the amount of expenditures to be made, and certify it to the board of supervisors of the county; and that board, at its next meeting, shall determine by a recorded vote, whether the expenditure is proper, and if *two-thirds* of the number present shall deem it inexpedient, it is not to be made. The result is to be certified to the court, and if two-thirds of the board are *not opposed* to the expenditure, the court shall direct that the work shall proceed. (V. C. 1887, ch. 43, § 956.) On the other hand, when the court decides against the application, the applicant is to pay the costs, except the compensation of the commissioner, viewers, and surveyor; and except also the costs of the commissioners in the case above mentioned, where, in consequence of the sum awarded by the commissioners not exceeding that which the court had previously consented to allow, the *land-owner* has to pay the costs of the commission. (V. C. 1887, ch. 43, §§ 953, 958.)

1ⁱ. Where the Road to be Established is *not wholly in one County*.

The court of the one county may notify that of the other that a road is needed from the line of the former

county to some place in the latter; and if the court of the latter county concurs, the same proceedings are had as when a person applies to have a road established. If it does not concur, or if either court fail to do its part towards the work, the circuit court of the county whose court is complained of, at the instance of the court of the other county, shall by *mandamus* compel the delinquent court to do what it ought. (V. C. 1887, ch. 43 §§ 989, 990.)

5^g. The Building of Bridges or Causeways.

Small bridges and causeways, which it is practicable for the overseer of the road precinct to construct or repair with the means at his disposal, are to be constructed and repaired accordingly. But if that be not practicable, the work must be contracted for by commissioners appointed by the county court, and acting under its direction; no contract being valid until it is ratified and approved by the court. The needful charges of such works are included in the county levy. It is provided, however, as we have seen, that where the gross expenditure chargeable to the county will exceed \$30, no order is to be made by the court, for any road, bridge, alteration or repairs, until the proposition has been submitted to the board of supervisors; and if two-thirds of the board deem the expenditure inexpedient, the court is to proceed no further. And if a bridge and causeway, or either, be necessary "*over a place*" between two counties, it is performed at their common *ratable* expense, in proportion to the taxes in each, in pursuance of an arrangement concurred in by the courts thereof respectively; or if they do not agree, the matter is adjusted by means of a *mandamus* from the circuit court of the county whose court is recusant. (V. C. 1887, ch. 43 §§ 988 to 990; *Gloucester v. Middlesex*, 1879, Va. 16.)

The mode of making contracts for bridges, roads, &c., is described with minuteness, and is essentially the same in all the cases. One or more commissioners of roads are directed to receive proposals for the work, for which they are to advertise in a newspaper for four weeks, or at the front-door of the court-house on a court-day; the proposals to be put in, in writing, on the first day of the *next court*, or some named day *subsequent* thereto. They make the contract, and return it, *with all the proposals*, to the county court; and from the time it is ratified by the court, and a bond with sufficient sureties, to be approved by the court, is given by the contractor, it is obligatory on the contractor and on the county. (V. C. 1887, ch. 43, §§ 991, &c.)

6^g. The Discontinuing of Roads or Landings.

The county court has power in its discretion to discontinue a county road and landing, after due notice, and after

a report *in writing*, from three or more *viewers* or commissioners, whether any, and if any, what convenience would result from the discontinuance. If upon this report and other evidence the court shall think it fit to discontinue such road or landing, it must take care, in case it be an established *post-road*, to suspend final action until another has been substituted. (V. C. 1887, ch. 43, §959; Senter & als. v. Pugh, 9 Grat. 260.)

7^g. Erection of Gates across Roads, &c.

Application may be made to a county court, after due notice, to permit gates to be erected across any road therein; but always to be discontinued when the court shall so direct. (V. C. 1887, ch. 43, §§ 960, 961; Carpenter & als. v. Sims, 3 Leigh, 675.)

8^g. Duty of Owner or Occupier of a Dam, to maintain a Road or Bridge over it. See V. C. 1887, ch. 43, § 962.

9^g. Extent of Right acquired by the Public upon Opening a Highway.

The public acquires *merely a right of passage*. The *freehold*, and *all the profits* of the soil (*e. g.*, trees, mines, &c.), belonging still to the proprietor from whom the right of passage was acquired. He may therefore recover the *freehold* in ejectment, subject to the right of way, and may maintain an action of trespass for digging the ground. If it be unknown from which of two adjacent proprietors a highway was at first taken, or if the highway be the boundary between them, they are understood to own each *ad medium filum viæ*. (Bac. Abr. Highways, (B.); Bolling v. Mayor of Petersburg, &c., 3 Rand. 563; Home v. Richards, 4 Call, 441; Harris v. Elliott, 10 Pet. 25.)

10^g. Dedication of Highways to the Public.

The long enjoyment of a road by the public as a highway is only one element to justify a presumption of dedication. There must also be an *acceptance* by its accredited officers, as by appointing overseers, or the like. On the other hand, if the public authorities treat a road as a public highway, a comparatively short time of enjoyment by the public will warrant a presumption of dedication on the part of the owner. (Clark v. Mayo, 4 Call, 374; Holleman v. Com'th, 2 Va. Cas. 135; Sampson v. Goochland Justices, 5 Grat. 251; Kelly's Case 8 Grat. 632.) And when a highway has been thus dedicated and accepted, an unlawful obstruction thereof is not legalized by the lapse of any time, however long. (Taylor's Case, 29 Grat. 780; Yates v. Town of Warrenton, 84 Va. 339.)

11^g. Police Regulations touching Highways.

To kill a tree and leave it standing within fifty feet of a road; to injure a bridge, sign-board, or mile-stone; to obstruct a road; to allow one's *mill-dam*, over which a road

passes, to be in unsafe condition; to fail to drive seasonably to the right when meeting, or to the left when overtaking, a vehicle; to drive or ride over a bridge faster than a walk; to be concerned in a horse-race on a public road; to fail in one's duty as a surveyor: all these are misdemeanors, punished by fines of various amounts, which, if they *may not* exceed \$20, are recoverable before a justice, otherwise in a court of record. (V. C. 1873, ch. 96, §§ 1 to 4; Id. ch. 41, § 1; V. C. 1887, ch. 43, §§ 962, 1007; Id. ch. 189, §§ 3862 to 3864; Synops. Crim. Law, 180-'81.)

6^f. Overseers of the Poor; w. c.

1^g. Antiquity and Original of the Office of Overseer of the Poor; w. c.

1^h. Antiquity and Original of the Office of Overseer of the Poor in England.

Until the time of Henry VIII., the poor of England subsisted entirely upon private benevolence, and especially upon the alms of the monasteries, and other religious houses. It is said, indeed, that by the common law the poor were to be sustained by the parson and the parishioners, so that none should die for default of sustenance; but no compulsory method was chalked out for the purpose until the Stat. 27 Hen. VIII., c. 25, when the total dissolution of the monasteries made some legal and coercive provision indispensable. During the reign of Henry VIII. and his children, the legal system of maintaining the poor was not a little improved by the erection of hospitals for the impotent and work-houses for the vigorous and idle; and at length, by 43 Eliz. c. 2, *overseers of the poor* were provided for every parish. (1 Bl. Com. 359-'60.)

2^h. Antiquity and Original of the Overseer of the Poor in Virginia.

No statute containing a compulsory provision for the poor seems to have been enacted in Virginia until 1720, save only that *poor children* were ordered to be *bound out* as apprentices in some instances. The *church-wardens*, and not overseers of the poor, were at first charged with the system. The provisions closely resembled those of our existing statutes, especially as respects a *settlement*, and the treatment of *vagrabonds*. (4 Hen. Stats. 208 & seq.; 1 Do. 336.)

The subject remained in the hands of the church-wardens and vestries until the dissolution of the church establishment, in 1779, when *overseers of the poor* were directed, by act of May, 1780, (10 Hen. Stat. 288), to be chosen in certain counties; a provision which, in 1782, was extended to certain other counties (11 Hen. Stats. 62, &c.) and in 1785 to the whole commonwealth, the counties being laid off into districts, and three overseers chosen *by the legal voters* in each. (12 Hen. Stats. 27 & seq.)

2^c. Appointment, Removal, and Mode of Securing Fidelity of Overseers of Poor; w. c.

1^b. Modes of Appointment, and of Removal of Overseers of Poor, and of Securing their Fidelity in England; w. c.

1ⁱ. Mode of *Appointment* of Overseers of Poor in England.

By Stat. 43 Eliz. c. 2, they were appointed for a year, by two neighboring justices, in addition to the churchwardens. By Stat. 22 Geo. III., c. 83, parishes were authorized to substitute *guardians* for overseers, and by 59 Geo. III., c. 12, to substitute a committee of parishioners, called a *select vestry*. By Stat. 4 & 5 Wm. IV., c. 76, and several subsequent acts, the whole supervision of the execution of the poor-laws of the realm was committed to a central board, called "*the poor-law commissioners*," with power to make regulations for the guidance of the parochial authorities, subject to some restraints. (1 Bl. Com. 360; 3 Steph. Com. 200 & seq.)

2ⁱ. Mode of *Removal* of Overseers of Poor in England.

They are liable to be removed by the appointment of successors, by removal from the locality, or by reason of insolvency. They may also be excused, for sufficient cause, by the general *quarter-sessions*. (4 Burns' Just. 24-'5.)

3ⁱ. Mode of *Securing the Fidelity* of Overseers of Poor in England.

By the penalties for official malfeasance, or non-feasance. (4 Burns' Just. 30.)

2^b. Mode of Appointment and of Removal of Overseers of the Poor in Virginia, and of Securing their Fidelity; w. c.

1ⁱ. Mode of *Appointment* of Overseers of the Poor in Virginia.

Elected, one in each magisterial district, by the voters thereof, to serve for two years, from 1st July ensuing election. (Va. Const. 1869, Art. VII., § 2; Amendm't 1874; V. C. 1873, ch. 6, § 9; V. C. 1887, ch 9, § 96.)

2ⁱ. Mode of *Removal* of Overseers of Poor in Virginia.

For causes, and by modes the same as in case of the sheriff. (*Ante*, p. 108, 2ⁱ.)

3ⁱ. Modes of *Securing the Fidelity* of Overseers of Poor; w. c.

1^k. Oaths of Office.

The same as in case of the sheriff. (*Ante*, p. 110, 1^k.)

2^k. Penalties for Malfeasance and Non-feasance.

The penalties are such as the common law denounces against official malfeasance and non-feasance, namely, fine and amotion from office. (Bac. Abr. Offices, (N.); 1 Th. Co. Lit. 238-'9, & n. (I., 1).)

3^k. Official Bond.

In a penalty of not less than \$500, to be determined by the court or judge when the overseer qualifies, it being required that the penalty shall *not be less than double* the amount of money which will probably pass through his hands. (V. C. 1873, ch. 47, § 62; V. C. 1887, ch. 35, §§ 812, 814; Id. ch. 13, § 177.)

3^g. Duties of Overseers of the Poor; w. c.

1^h. Duties of Overseer of the Poor in England.

4 Burns' Just. 27 & seq.; Id. 248.

w. c.

1ⁱ. To raise Money for the Support of the Poor.

They are to raise competent sums by levying *rates* on the parishioners, for the necessary relief of the impotent poor settled in the parish, who are not able to work. (1 Bl. Com. 360.)

2ⁱ. To Provide Work for the Poor who are able to work.

1 Bl. Com. 360.

3ⁱ. To Adjust, in the first instance, Questions of Settlement, and to cause Paupers to be Removed to their own Parish.

1 Bl. Com. 363; 3 Steph. Com. 207 & seq.; 4 Burns' Just. 411 & seq.

2^h. Duties of Overseers of the Poor in Virginia; w. c.

1ⁱ. Organization of Board of Overseers.

Formerly the overseers were required to meet at the time and place fixed by the county or town authorities, and appoint a president and clerk, whereupon they constituted a *corporation*, by the name of the *overseers of the poor of such county or town*. Afterwards they appointed their own meetings. (V. C. 1860, ch. 51, §§ 2 to 4, 9; V. C. 1873, ch. 47, § 51; V. C. 1887, ch. 38, § 882.) But such organization seems now to be superfluous, the former general supervision of the whole system in each county, which was vested in the board of overseers, being now devolved on the superintendent of the poor and on the board of supervisors. The overseer's function appears to be practically such only as he exercises *individually* in his own district.

2ⁱ. Apparatus Provided by Law for the Care of the Poor.

A superintendent of the poor is appointed in the manner provided by law, and the law provides that he shall be nominated by the board of supervisors of each county and appointed by the county judge at the June term of his court. He serves for four years, and until his successor qualifies. (Art. VII. § 1, Va. Const. 1869; V. C. 1873, ch. 51, § 1; Amendments 1874; V. C. 1887, ch. 9, § 95; Id. ch. 35, § 812.)

He qualifies before the judge of the circuit or county court of his county, in term-time or vacation, by taking the oaths of office, and executing bond, with approved

security, in a penalty prescribed by the judge or court, but in no case less than \$4,000. (V. C. 1873, ch. 51, § 1; V. C. 1887, ch. 35, §§ 812, 814.)

He has *charge of the county poor-house*, or when there is none, provides suitable accommodations, under the direction of the *board of supervisors*, making reports annually, or oftener, if required, of expenditures, and of whatever relates to the business of maintaining the poor. (V. C. 1873, ch. 51, §§ 2 & seq.; §§ 47, 49 & seq.; V. C. 1887, ch. 38, §§ 868, &c.)

The board of supervisors may appoint a physician and nurse to attend the poor at the place of general reception for the county, and allow reasonable compensation therefor. (V. C. 1873, ch. 51, § 2; V. C. 1887, ch. 38, § 870.)

While it is the business of the superintendent of the poor to take charge of and provide for all paupers committed to him at the place of *general reception* by the individual overseers, or otherwise, according to law, the expense is provided for according to an estimate submitted by the superintendent, by the board of supervisors of the county, which is also to provide necessary buildings, and a suitable farm, as a place of general reception for the poor of the county. (V. C. 1873, ch. 51, §§ 2, 8, 9; V. C. 1887, ch. 38, §§ 868, 869, 872.)

3ⁱ. Powers and Duties of Individual Overseers.

To provide for sending to the poor-house those paupers who are *settled* in the county or corporation; to repel intruders, and to arrest vagrants. (V. C. 1873, ch. 51, §§ 6, 7, 12, 14; V. C. 1887, ch. 38, §§ 876, &c.)

W. C.

1^k. Who are the Poor to be Provided for; w. c.

1^l. Who are Poor within the Law.

The poor within the law will include any one unable to maintain himself, and the family of one unable to maintain it, when the family is unable to maintain itself. (V. C. 1873, ch. 51, § 14; V. C. 1887, ch. 38, § 876.)

2^l. What Poor are to be Provided for.

Those *poor* are to be provided for who have a *legal settlement* in the county. A person has a legal settlement in a magisterial district who has *resided* therein for *one year*, and in a *county or town*, who has *resided* in the same for *one year*; provided in either case, if he has migrated into the State within *three years*, he shall have been, at the time of migrating, *able to maintain himself*. (V. C. 1873, ch. 51, § 14; V. C. 1887, ch. 38, § 876.) But, doubtless, notwithstanding the silence of the statute, *birth, parentage, and the marriage of a feme*, will also confer a settlement. (4 Burns' Just. 416, 436, 473; 1 Bl. Com. 363, and n. (53) to (55).)

The question of legal settlements has not yet occasioned much trouble with us. It is, however, not without its intricacies, and in England no branch of legal inquiry is more vexed with doubts and conflicting decisions. This is particularly liable to be the case where the marriage of a female intervenes to obscure or suspend her original settlement by birth, the husband having no settlement. Thus the widow of a foreigner, who had no *parochial settlement* in England, being left destitute on the death of her husband, was removed from a parish in London to her *native parish* in the country, which latter resisting the attempt to charge it with an additional pauper, the case came up for decision to the court of king's bench, which held that the woman's settlement was *suspended* by the marriage during the husband's life-time, but that upon his death it *revived* again. But some years afterwards, another case of like kind occurred, except that the unsettled husband did not die, but *ran away*. The king's bench thereupon reviewed its former judgment, and reversing its previous doctrine with the same *unanimity* with which it had pronounced it, determined that a *suspension* of the settlement could not be maintained, but that the maiden settlement continues after marriage, until a *new settlement is gained*; and that, although the wife cannot be separated from her husband by an order of removal, yet if he, having no settlement, has deserted her, she may be sent to her parish for relief, *even in his life-time*. (1 Bl. Com. 363; St. Michael v. Nully, 1 Stra. 544; Rex v. Hincksworth, 1 Dougl. 46, n. (13); Rex v. Leigh, 1 Dougl. 46; 2 Campb. Lives of Ch. Justices, 1882-'83.)

2^k. To whom Application for Relief is to be made.

Application for relief in case of a pauper is to be made to the overseer of the magisterial district wherein the pauper has a legal settlement; or if he has a legal settlement in the *county*, but not in any particular district therein, it would seem that application may be made to *any overseer* of the county, or rather to the overseer of the district wherein such pauper *may be*. (V. C. 1873, ch. 51, § 14; V. C. 1887, ch. 38, § 876.)

3^k. Redress, if Relief is Wrongfully Refused.

If relief be wrongfully denied, redress is afforded by the court of the county or corporation, which will compel the overseer to give the proper assistance. (V. C. 1873, ch. 51, § 15; V. C. 1887, ch. 38, § 877.)

4^k. Modes of Maintaining or Assisting the Poor; w. c.

1^l. General Rule.

The pauper must for the most part be sent to, and

kept at, the place of *general reception* of the poor for the county, and if able to work, shall be made to do so. (V. C. 1873, ch. 51, § 12; V. C. 1887, ch. 38, § 881.)

2^l Proviso.

A district overseer, however, by consent in writing of the *supervisor* of the district, may provide assistance at the *pauper's residence* (supposing him to have a legal settlement in the district,) when it would be injudicious to remove him to the place of general reception of the county; and the expense is to be certified by the overseer, to the board of supervisors, and provided for in their annual levy. (V. C. 1873, ch. 51, § 12; V. C. 1887, ch. 38, § 881.)

5^k. Removal of Intruders not Legally Settled; w. c.

1^l. Removal of Intruder having a Legal Settlement in the Commonwealth; w. c.

1^m. Mode of Removal.

Upon complaint of an overseer to a justice of the county or town, the justice by warrant shall cause the pauper to be removed to "the county or town of his legal settlement, but not to the prejudice of his health. V. C. 1873, ch. 51, §§ 16, 17; V. C. 1887, ch. 38, §§ 878, 879.)

2^m. Proceeding if the Overseer of the Pauper's Legal Settlement Refuse to Receive him.

The legal obligation of the authorities there, is not only to receive him, but to pay all the expenses attending his removal; and if they refuse, they may be compelled by their county or corporation court. (V. C. 1873, ch. 51, § 17; V. C. 1887, ch. 38, §§ 878, 879.)

2^l. Removal of Intruder not having a Legal Settlement in the Commonwealth.

The overseer of the district *may himself issue a warrant* to a constable to carry a pauper to the State where his legal settlement is. (V. C. 1873, ch. 51, § 18; V. C. 1887, ch. 38, § 880.)

6^k. Proceeding against Beggars and against Vagrants; w. c.

1^l. Proceeding against *Beggars*.

The overseer is to issue a warrant to a constable to arrest all beggars going about, or staying in one place to beg, and to carry them to the poor-house; or if they have a legal settlement in any other county or town in this state, or if they have no legal settlement in Virginia, then to remove them to the county, town, or state where their legal settlement is. (V. C. 1873, ch. 51, § 18; V. C. 1887, ch. 38, § 880.)

2^l. Proceeding against *Vagrants*; w. c.

1^m. Method of Proceeding.

The overseer is to apply to a *justice of the peace*, whose duty it is, if, upon examination, the party prove to be a *vagrant*, to issue a warrant requiring the constable to *hire him out* for three months for the best wages that can be obtained, to be applied to the use of the vagrant or his family. And if he run away without sufficient cause, he is to be apprehended and returned to the hirer, who is then to have him *free of wages for a month additional*, and further steps are authorized to compel him to work, or else to inflict on him severe punishment in the way of imprisonment. (V. C. 1873, ch. 51, § 20; V. C. 1887, ch. 38, § 88.)

2^m. Who are Vagrants; w. c.

The following persons are by statute declared to be vagrants, namely:

1ⁿ. Those who shall unlawfully return to a county or corporation after being lawfully removed.

(V. C. 1873, ch. 51, § 19; V. C. 1887, ch. 38 § 88.)

2ⁿ. Those who, being without means to maintain themselves and their families, *live idly and without employment*, and refuse to work for the usual wages given to other laborers in the like work, in the place where they are. (Id.)3ⁿ. Those who shall refuse to perform the work allotted them by the overseer of the poor. (Id.)4ⁿ. Those who go about from door to door, or place themselves in the streets, highways, or other roads, to *beg alms*, and all persons wandering abroad and begging, unless disabled, or incapable of labor. (Id.)5ⁿ. Those who come from *without the Commonwealth*, and loiter or reside therein, following no labor, trade, occupation, or business, having no visible means of subsistence, and who can give no *reasonable account* of themselves, or their business in the place where they are. (Id.)7^k. Proceeding in Respect to *Pauper-Children*; w. c.

1. Proceeding touching Bastards.

An overseer of the poor was never by law allowed, in Virginia, to *inaugurate a proceeding* to charge a *putative father* with the support of a bastard. The *mother* must first have *voluntarily* made oath before a justice of the peace to the paternity of the child; but when the accusation had once been made, proceedings thereupon might have been had as well at the instance of the overseer as of the woman, the attorney for the commonwealth appearing in behalf of either. The putative father, having been arrested, was required to enter into recognizance to appear to answer the charge, and

if convicted of it, was constrained to give bond to pay *annually* to the overseer of the poor, for the maintenance of the child, such sums as the court might order. (V. C. 1873, ch. 121, §§ 1 to 3 & seq.) But this provision being applicable only to *white women*, an apprehension arose that it was in conflict with the provision of the Civil Rights Act of 1866 (Rev. Stats. U. S. p. 348, §§ 1977 & seq.), or to Amendment XIV. of U. S. Constitution, and under the influence of that groundless apprehension, the whole doctrine touching the charging of putative fathers with the maintenance of bastards has been repealed. (Acts 1874-'5, p. 94, ch. 112.)

The apprehension is deemed to be groundless, because the proceeding is not for the benefit of the mother, who is not legally bound to support the child, but for the relief of the county.

2^d. Proceedings to *provide* for Pauper-Children.

An overseer of the poor, by *previous order of the county or corporation court*, may place in an incorporated asylum for destitute children, or may bind as apprentice, any minor *found begging* in his county or corporation, or *likely to become chargeable thereto*; and the master of such apprentice is *bound by law*, whether it be so stipulated or not, to teach him reading, writing, and common arithmetic, including the rule of three. (V. C. 1873, ch. 122, §§ 3, 5; V. C. 1887, ch. 115, §§ 2583, &c.)

7^f. Escheators; w. c.

1^g. Antiquity and Original of the Office of Escheator; w. c.

1^h. Antiquity and Original of the Office of Escheator in England.

The office of escheator is an ancient office of great importance, while the feudal tenures, with their oppressive incidents, flourished in vigor. There were but two in the realm originally, one to act south of the Trent, and the other beyond it. Great abuses having been committed by escheators in previous reigns, it was ordained by 14 Edw. III., c. 8; 36 Edw. III., c. 13; and 38 Edw. III., c. 2, that one should be appointed *annually*, for every county, like sheriffs, by the chancellor, treasurer, chief baron, and two chief justices; that they should do no waste in the lands they seized; that they severally should take their inquests *openly, and not privately*, by persons of substance and character in the county where the lands were, by *indenture* between them and the escheator himself; and that he should return the inquest promptly into chancery, where it was liable to be *traversed*, or controverted, within a limited time. And those safeguards were further strengthened by 18 Hen. VI., c. 6, and 1 Hen. VIII., c. 8. (1 Jac. L. Dict.

Escheator; 2 Reeves' Hist. Eng. Law, 273, 276; 4 Do. 231; 2 Th. Co. Lit. 196, 197, & n. (12.)

2^h. Antiquity and Original of the Office of Escheator in Virginia.

The first mention of escheats is in an act of Assembly of March, 1659, whereby certain lands liable to escheat were appropriated to indemnify the county of New Kent, for money paid by it for the deceased owner. (1 Hen. Stats. 548.) The royal commissioners, in March, 1661, proposed sundry provisions to quiet the titles of persons who had bought lands *liable to escheat* of the *administrators* of decedents, and it would seem that at that time no escheators existed. (2 Hen. Stats. 65, 136.) But in 1703 Beverly mentions the form of proceedings observed in order to escheat lands (Bev. Hist. Va. 243), and from an act of Oct. 1705, (4 Anne), it seems inquests of escheat had been repeatedly taken since 1676 (28 Car. II.), doubtless in pursuance of the law and practice in England; but still no provision appears for the appointment of escheators (3 Hen. Stats. 316); nor does any seem to have been *formally* made until 1785, when the county courts were required to nominate some proper person to be commissioned by the governor and council. (12 Hen. Stats. 117.) Traces of proceedings of escheat, however, and of the existence of escheators, are met with, *i. g.*, in May, 1779. (10 Hen. Stats. 67 & seq.)

By act of November, 1792, escheators are directed to be appointed, for every county and corporation, by the governor, upon the recommendation of the county or corporation court. (1 Stats. at Large (new series), 51.) But since 1855, they have been appointed by the agency of the governor alone, without any recommendation by the court. (V. C. 1873, ch. 109, §§ 6 & seq.; V. C. 1887, ch. 105, §§ 2371, 2372.)

2^g. Mode of Appointment and of Removal of Escheators and of Securing their Fidelity; w. c.

1^h. Mode of Appointment and of Removal, etc., in England; w. c.

1ⁱ. Mode of *Appointment* of Escheators in England.

Appointed, it seems, *annually*, by the chancellor, treasurer, chief baron, and two chief-justices. (1 Th. Co. Lit. 196; Bac. Abr. Prerog. (B.); 2 Reeves' Hist. E. L. 273.)

2ⁱ. Mode of *Removal* of Escheators in England.

By judgment of a competent court, upon conviction (on indictment or information) for malfeasance or non-feasance; or for removal from the sphere of duty, *i. e.*, from the county. (1 Th. Co. Lit. 237 & seq.; Id. 239, & n. (K. 1); Bac. Abr. Offices, (M.) and (N.); Jac. Law. Dict. Office, IV.)

3ⁱ. Mode of *Securing Fidelity* of Escheator in England.

By the penalties for official malfeasance and non-feasance. (Bac. Abr. Offices, (M.) and (N.).)

2^h. Mode of Appointment and of Removal of the Escheator, and of Securing his Fidelity in Virginia; w. c.1ⁱ. Mode of *Appointment* of the Escheator in Virginia.

One escheator shall be appointed by the governor, for every county, and for every town having a corporation court, to hold office during good behavior. (V. C. 1873, ch. 109, § 1; V. C. 1887, ch. 105, §§ 2371, 2372.)

2ⁱ. Mode of *Removal* of the Escheator in Virginia.

He may be removed by the governor, for misbehavior, incapacity, or neglect of official duty; or by the appointment and qualification of a successor; or by judgment of a competent court, upon conviction of malfeasance, non-feasance, removal from sphere of duty, etc. (V. C. 1873, ch. 109, § 2; V. C. 1887, ch. 105, § 2372; Bac. Abr., Offices (M.) and (N.); *Supra* 2^a; *Ante*, p. 108.)

3ⁱ. Mode of *Securing Fidelity* of the Escheator in Virginia; w. c.1^k. Oaths of Office.

Same as in case of sheriff. (*Ante*, p. 110, 1^k.)

2^k. Official Bond.

In the penalty of \$3,000, payable to the commonwealth. (V. C. 1873, ch. 109, § 2; Id. ch. 12, § 6; V. C. 1887, ch. 105, § 2372; Id. ch. 13, § 177.)

3^g. Duties of Escheator; w. c.1^h. Duties of the Escheator in England.

The duty of the escheator in England is to look properly to escheats, *wardships* (abolished for the most part, since Stat 12, Car. II.), and other casualties belonging to the Crown. He conducts his inquiries by means of a *jury of inquest*, composed of *freeholders*, sitting publicly, and certifies the inquisition, in the form of an *indenture* between himself and the jurors, into the court of chancery, where it may be *traversed*, within a limited time. (Bac. Abr. Prerog. (B.).)

2^h. Duties of the Escheator in Virginia.

The escheator is required, upon information from the commissioner of the revenue of the county or corporation (which information it is the commissioner's duty to furnish annually), or from any other person, *in writing*, under oath, of any lands in his county or corporation as to which any one who was seised thereof has died intestate and without any known heir, or to which *no person is known by him to be entitled*, to proceed to cause the same to be escheated to the commonwealth. (V. C. 1873, ch. 109, §§ 3 & seq.; V. C. 1887, ch. 105, §§ 2374, &c.)

w. c.

1ⁱ. What Lands are Exempt from Escheat.

Lands are exempt from escheat which for twenty years have been in the *actual possession* of the person claiming the same, or those under whom he holds, and upon which taxes have been paid *within that time*; and those also where the *legal title alone* is liable to escheat, the beneficial ownership not being so liable. (V. C. 1873, ch. 109, §§ 3, 25; V. C. 1887, ch. 108, §§ 2374, 2396.) So lands are not liable to escheat which are by will devised to be sold, and the *proceeds* given to *aliens*. Such a devise is not adverse to the policy of the law, since aliens thereby acquire no interest in the lands, but in the *proceeds* only. (Com'th v. Martin's Ex'ors, 5 Munf. 117; Com'th v. Selden & als., Id. 160.)

2ⁱ. Proceedings by the Escheator in Virginia to Escheat Lands; w. c.1^k. Public Notice of the Inquest.

Notice of the inquest must be given by advertisement at the door of the court-house for thirty days, including a court-day. (V. C. 1873, ch. 109, § 4; V. C. 1887, ch. 105, § 2375.)

2^k. Inquest of Escheat.

The sheriff or sergeant is to summon sixteen *freeholders*, of whom *at least twelve* must be impanelled as jurors. They meet at the court-house and sit *in public*, and may be adjourned by the escheator from day to day, and may be punished by the *circuit court* for non-attendance; every person being suffered to give evidence *openly* in the presence of the jurors. (V. C. 1873, ch. 109, §§ 5, 6; V. C. 1887, ch. 105, §§ 2375, 2376.)

If the title liable to escheat be an *equitable* one, the escheator must proceed to enforce the rights of the commonwealth by a *bill in equity*. (Bac. Abr. Alien, (C); Com'th v. Martin, 5 Munf. 117; Hubbard v. Goodwin, 3 Leigh, 510 & seq.)

3^k. The Verdict or Inquisition of the Jurors.

Twelve at least of the jurors must concur in the verdict of escheat, and must *sign the same* as well as the escheator, whose duty it is, within sixty days, to transmit the substance of it to the register of the land-office, and within thirty days to return the inquisition to the *clerk of the circuit court*, who, within thirty days from the receipt of it, is required to transmit a copy to the clerk of the county or corporation court, to be recorded. (V. C. 1873, ch. 109, §§ 7, 11; V. C. 1887, ch. 105, §§ 2378, 2385.)

4^k. Redress Afforded to Persons Aggrieved by the Verdict of Escheat.

Persons aggrieved, whether their interest be legal or

equitable, may apply for redress by *petition* (which is understood to be equivalent to a *bill in equity*) to the *circuit court* of the county or corporation where the proceedings of escheat took place, making the escheator defendant, who shall file an answer; and upon the petition, answer and evidence, the cause shall be heard without unnecessary delay. Disputed facts are ascertained *by a jury*, whose verdict, however, the court, if it sees fit, may set aside. The lands, pending the petition, may be committed to the claimant, on his giving bond, with good security, to pay the rents and profits to the commonwealth, if the right be found in its favor; or if not so committed, they remain in the escheator's hands, to be leased out by him, he being answerable (according as the right is determined) to the commonwealth, or to the claimant, for the rents and profits, and for *waste*. Persons aggrieved may also, instead of proceeding by petition or bill in equity (which is a statutory remedy), resort to—

1. *Petition of Right*, which is a common law proceeding in chancery in the nature of a real action, prosecuted by leave of the Crown or the commonwealth, to recover lands, &c., illegally seized by public authority. (3 Bl. Com. 256; Bac. Abr. Prerog. (E.).)

2. *Monstrans de Droit*, which is likewise a common law proceeding in chancery, whereby the rights of a subject, when invaded by the Crown or commonwealth, are vindicated. (3 Bl. Com. 256-7; Bac. Abr. Prerog. (E.); Edwards v. Van Bibber, 1 Leigh, 194; Fiott & als. v. Com'th, 12 Grat. 565.)

3. *Traverse of Office*, which is a proceeding (allowed by Stat. 2 & 3 Ed. VI., c. 8) (V. C. 1873, ch. 15, § 2), whereby the subject may contest or deny the truth and validity of inquisitions of office. (3 Bl. Com. 257; Bac. Abr. Prerog. (E.); Fiott & als. v. Com'th, 12 Grat. 565.)

The *petition of right* and the *monstrans de droit* are said by Blackstone to be of common law origin; but the latter was much improved by Stat. 36 Ed. III., c. 13; and 2 and 3 Ed. VI., c. 8. (3 Bl. Com. 257; V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3; Bac. Abr. Prerog. (E.); V. C. 1873, ch. 109, § 8 to 12, 28; V. C. 1887, ch. 105, §§ 2379 to 2384, 2399; Edwards v. Van Bibber, 1 Leigh, 194; Hite's Case, 6 Leigh, 588; Fiott & als. v. Com'th, 12 Grat. 564.)

The benefit of all writs, remedial and judicial, given by any act of Parliament, made in aid of the common law, prior to the fourth year of James I. of a general nature not local to England, shall still be saved to our people, so far as the same may consist with the bill of rights

and constitution of this State and the acts of Assembly, (V. C. 1873, ch. 15 § 2; V. C. 1887, ch. 2 § 3; Dyke v. Woodhouse, 3 Rand. 291.)

5^k. Proceedings to Sell Escheated Lands.

They are sold under the *direction of the governor*, after giving public notice of the escheat and of the sale for six weeks in the newspapers of Richmond and of Washington. The escheator makes the sale as directed by the statute, and pays the proceeds into the treasury, deducting a commission of *ten per cent.* on the proceeds. (V. C. 1873, ch. 109, §§ 13 to 24; V. C. 1887, ch. 105 §§ 2387 &c.)

6^k. Provision made in Favor of *Mortgagees, Tenant, for years of Escheated Lands, Persons entitled to Rents issuing out of the same, and Creditors of the Last Owner.*

The interests of such persons are protected, whether found in the inquisition or not. The creditor proceeds *in equity*. (V. C. 1873, ch. 109, §§ 26-27; V. C. 1887, ch. 105, §§ 2379, &c.; *Watson v. Lyle's Adm'r*, 4 Leigh. 236.)

8^f. Supervisors.

One supervisor is elected for each magisterial district, by the voters thereof, to serve for *two years*. (Va. Const. 1869, Art. VII., § 2, Amendm't 1874.) The supervisors of all the districts constitute the *board of supervisors* for the county, whose duty it is to audit the accounts of the several county officers; to examine the books of the commissioners of the revenue, and equalize the valuation of property; to buy, sell, or exchange lands needful for public purposes; to build and keep in repair county buildings, or to provide suitable rooms for county purposes; to cause the county buildings to be insured; to fix the county levies for the ensuing year (for the purpose of public buildings, roads, poor, schools, etc.); and to perform any other duties required by law. (Va. Const. 1869, Art. VII., § 2.)

See V. C. 1873, ch. 47, §§ 4 to 26; V. C. 1887, ch. 36, §§ 825, & seq.

CHAPTER X.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS OR CITIZENS.

2^d. The Relation of People, and the Rights and Correspondent Duties belonging thereto; w. c.

1^o. The Doctrine of Allegiance.

Allegiance is the tie (*ligamen*) which binds the subject to the government, in return for protection. The *thing* is

founded in reason, and in the nature of society and government. The *name and form* are derived from the feudal system, transmitted from our Gothic ancestors. (1 Bl. Com. 366; 2 Steph. Com. 420.)

We are to note, (1), The nature of allegiance; (2), The right to renounce allegiance; and (3), The oath of allegiance.

W. C.

1^f. The Nature of Allegiance; w. c.

1^g. The Different Sorts of Allegiance; w. c.

1^h. Natural Allegiance; w. c.

Natural allegiance is that which is due from all persons born within a country, immediately upon birth, in return for the protection afforded, and also as indispensable to the maintenance of society, which the Creator has ordained. It is permanent, and although not perpetual and inalienable, as the common law held it, yet subsists as long as one continues a member of the community in which he was born, and cannot, without *moral* offence, be abjured, save with due regard to that community's interests and will. (1 Bl. Com. 370; 1 Tuck. Bl. (Pt. II.), App'x 91, n. (K.); 2 Kent's Com. 45, 49; 1 Tuck. Com. B. I., pp. 57 to 60.)

2^h. Local or Temporary Allegiance.

Local or temporary allegiance is that which is due even from an alien, as long as he continues within the state's dominion and protection, and ceases when he transfers himself to another country. Allegiance is the correlative of protection, and continues as long as the protection does. Hence it is due to a *de facto* government,—to practice against which will not only be regarded *by itself* as treasonable, and be punished accordingly, but will be punished also by the rightful government when restored, except in so far as the attempt was in defence or aid of the rightful authority; *e. g.*, in case of Edward IV., who, upon his accession, punished treasons against his predecessor, Henry VI., whom, notwithstanding, he and his parliament pronounced a usurper. (1 Bl. Com. 370–71; 1 Tuck. Com. 59; Bac. Abr. Aliens (C. 2).)

2^g. The Obligations and Rights Growing out of Allegiance;

W. C.

1^h. The Obligations Growing out of Allegiance.

The obligations growing out of allegiance are independent of, and prior to, any recognition thereof by oath or otherwise, and are concisely expressed in the ancient oath of allegiance, as administered in England for six hundred years prior to the Revolution of 1688, at which time it was made more general. The old form expressed a promise: “*to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb, and*

terrem honor, and not to know or hear of any ill or damage intended him without defending him therefrom." (1 Bl. Com. 368, 369.)

2^b. The Rights Growing out of Allegiance.

These, like the obligations, exist antecedently to, and independently of, the sovereign's express promise, although the coronation oath in England exhibits a very just summary thereof: engaging that the monarch shall govern according to the established laws: that he will cause law and justice, in mercy, to be executed, and that he will preserve the rights and privileges of every class of his people. (1 Bl. Com. 369; 2 Steph. Com. 417-'18.)

2^d. The Right to renounce Allegiance; w. c.

1st. Doctrine at Common Law.

The natural allegiance above-mentioned is esteemed by the common law to be *perpetual, and inalienable* without consent of the government, the prevailing maxim being, *nemo potest patriam exuere*. (1 Bl. Com. 369-'70, & n. (5); Post. Cr. L. 184-'5; 2 Kent's Com. 42, 49; Doe v. Acklam, 2 B. & Cr. 779.) But by Statute 33 Vict. c. 14, it is provided that, in most cases, British subjects shall cease to be such upon becoming naturalized in a foreign state.

2nd. Doctrine in Virginia.

The doctrine in Virginia is, that the natural liberty of going whither one pleases cannot be circumscribed, consistently with *civil liberty*, save only so far as the general safety of the community may require. Hence it is inferred that, whilst the expatriation of a citizen may properly be forbidden in times of danger and crisis (*e. g.*, in time of war), it is a violation of his natural rights to deny it under other circumstances; and that being a part of the natural liberty of mankind, if there be no positive law qualifying the right, it exists *without restriction*. (1 Tuck. Bl. (Pt. II.), App'x 90; Puffend. B. VIII., ch. 11, §§ 1 to 4; Vat. Law of N., B. I., §§ 223 & seq.; 2 Kent's Com. 49; Grot. de Jur. Bell. et P. B. 2, ch. 5, § 25; 2 Burlamaq. p. 119 Pt. II., ch 5, § 14.) See Talbot v. Jansen, 3 Dall. 152; Murray v. The Charming Betsey, 2 Cr. 115; Santiss^a Trinidad, 7 Wheat. 347 (where the point is left undecided). But see Williams' Case, Whart. Am. St. Tri. 652, 655; Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. 99; and Shanks v. Dupont, 3 Pet. 242, which are adverse to the Virginia doctrine.

In Virginia, provision is made for the exercise of the right, except in *time of war*, by declaration entered of record in the county or corporation court of the county or corporation where the party *resides*, or by deed proved by two *subscribing* witnesses in the same court, and by *departing out of the country*; and this may be done perma-

nently, or for a time only. (V. C. 1873, ch. 4, §§ 2, 3, 4; V. C. 1887, ch. 6, §§ 40 to 42; Murray v. McCarty, 2 Munf. 396; Branch v. Bowman, 2 Leigh, 170.)

3^g. Effect of Expatriation from Virginia on Citizenship in the United States.

As a separate allegiance is due to the United States (it being possible for one to be a citizen of the United States and not of any State, *e. g.*, in case of a resident of the District of Columbia, or of the Territories), it would seem that expatriation from Virginia *would not affect citizenship in the United States*. (Talbot v. Jansen, 3 Dal. 153-'4, 164; Murray v. McCarty, 2 Munf. 404; Const. U. S., Amendm'ts, XIV.)

4^g. Doctrine in Respect to the United States.

The Congress of the United States for many years made no provision touching the subject of expatriation; and the right is supposed, therefore, to have existed in respect to the United States, *without restriction*. But see 2 Kent's Com. 49. See also Shanks v. Dupont & al. 3 Pet. 246; Inglis v. Sailors' Snug Harbor, 2 Pet. 99.

The assumption upon which these authorities rest, namely, that the common law is a part of the law of the United States in their aggregate capacity, seems to be a remarkable inadvertence. If any proposition of a politico-legal character can be deemed settled by argument, the famous Virginia (or Madison's) Report of 1799 has determined that the common law is not thus a part of the law of the United States. (Va. Report, Resolution V., p. 211 & seq.) And this doctrine is sanctioned by the Supreme Court. (Wheaton v. Peters, 8 Pet. 658.)

But at length, by Act of July 27, 1868, it is declared by Congress that the "right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and that this principle has been recognized by the United States government, by freely receiving emigrants from all nations, and investing them with the rights of citizenship. And the statute denounces any declaration, instruction, opinion, order or decision of any officer of United States which denies, restricts, impairs, or questions the right as "*inconsistent with the fundamental principles of the Republic*." (15 Laws U. S. p. 223, ch. 249; Rev. Stats. U. S. § 1999.)

3^f. The Oath of Allegiance.

The oath of allegiance, when taken, adds nothing, as has been seen, to the obligation of the citizen. The intent in requiring it is merely to strengthen the *social tie* by impressing the mind with the sanctions of religion. (2 Steph. Com. 423; 1 Bl. Com. 369-'71);

W. C.

1^c. The Oath of Allegiance in England.

The oath of allegiance in England contains a brief summary of the citizen's duty, and besides being required of all persons *in office*, it may be *tendered* by two justices to any one suspected of disloyalty. (1 Bl Com. 368, 369; 2 Steph. Com. 423-4.)

2^c. The Oaths of Allegiance in Virginia.

All *State and Federal* officers and legislators are required to take an oath to support the constitution and laws of the United States, which is essentially an oath of allegiance; and the State officers and legislators also swear in addition to support the constitution and laws of Virginia. (U. S. Const. Art. VI., § 3; Va. Const. 1869, Art. III., § 6; V. C. 1873, ch. 12, § 1; V. C. 1887, ch. 13, §§ 168, &c.)

2^e. The Different Classes of People in a Country; w. c.1^f. The Different Classes of People in England.

The different classes of people in England are, (1), Aliens; (2), Denizens; and (3), Citizens;

w. c.

1^g. Aliens.

All persons, by the common law, are aliens who are not born within the dominions, or *ligeance* of the Crown of England, either actually or by *construction* of law (*i. e.*, the children of a British ambassador born abroad, or children whose father, or grandfather on the father's side, is a natural-born subject), and have not been *naturalized*, or made *denizens*. (1 Bl. Com. 366, & n. (1); Bac. Abr. Aliens, (A.); Calvin's Case, 7 Co. 16^a.)

2^g. Denizens.

A denizen is an *alien-born*, who *ex donatione regis*, or by act of parliament, has obtained letters patent to make him an English subject. He may acquire and *hold* lands, by *purchase*, (*i. e.*, by his *own act*,) but not by *descent*, because his parent, through whom he must deduce his claim, had *no inheritable blood*; and for a like reason his issue, born before denizenation, cannot inherit to him. He is incapable of any grant of lands *from the Crown*, of being a member of parliament, or of holding *any office*. (1 Bl. Com. 374, & n. (20); Bac. Abr. Aliens, (B.))

3^g. Citizens.

Citizens of England are either, (1), Natural-born; or (2), Naturalized.

w. c.

1^h. Natural-born Citizens; w. c.1ⁱ. Persons Born in England.

All persons *born in England* are natural-born subjects, *although their parents are aliens*,—unless the parents were in the realm as *enemies*. (1 Bl. Com. 366, & n. (1); Id. 374, & n. (16); Calvin's Case, 7 Co. 18^a.)

2ⁱ. Persons Born in any of the Dominions, or within the *Ligeance* of the English Crown.

e. g., Persons born in Ireland, Scotland, Wales, or in the English colonies in America, or elsewhere; or in any conquest of England; or of English parents, in a country *overrun by English troops*. (1 Bl. Com. 366, & n. (1); Bac. Abr. Aliens, (A.); Calvin's Case, 7 Co. 18^a.)

3ⁱ. Persons Born Abroad, but *Constructively* in England. *e. g.*, Children of English ambassadors, or other persons in the public service abroad. (1 Bl. Com. 366, & n. (1), 373; Bac. Abr. Aliens, (A).)

4ⁱ. Persons Born Abroad whose Father, or Grandfather on the Father's Side, was a Natural-born Subject.

See 1 Bl. Com. 366, n. (1).

2^h. Naturalized Citizens.

There are no *general* naturalization laws in England, whose crowded population makes it undesirable to relax the disabilities of alienage. With a few exceptions, a special act of parliament is needed in each case, and is always accompanied by certain qualifications, as that the party shall not be a member of parliament, nor hold any office, nor receive any grant from the Crown. It does not release him from what is called his *natural allegiance* to the State where he was born; and if any conflict of duties ensues, he must submit to the consequences, resulting as they do from his own act. (1 Bl. Com. 374, & n., (21); 1 Tuck. Com. 63, &c., B. I.)

2^f. The Different Classes of People in Virginia.

The different classes of people in Virginia are, (1), Aliens; and (2), Citizens;

W. C.

1^g. Aliens.

All persons are aliens in Virginia who are not born within the limits of the dominion of the United States, or whose *fathers*, at the time of their birth, were not citizens of the United States, and who have not been naturalized. (Const. U. S. Amendment, XIV, § 1; Rev. Stats. U. S. §§ 1992, 1993.)

2^g. Citizens.

Citizens in Virginia may be classed as, (1), Persons who are or may be citizens by right of birth; and (2), Naturalized citizens;

W. C.

1^h. Persons who are, or may be, Citizens by Right of Birth;

W. C.

1ⁱ. Persons Born in Virginia.

Persons born in Virginia, even of *alien parents*, are citizens, unless the parents were present in the State *as enemies*. (V. C. 1873, ch. 4, § 1; V. C. 1887, ch. 6, § 39; *Supra*, p. 157, 1ⁱ; *Supra*, 4ⁱ.)

When any citizen of this State, being 21 years of age, shall *reside* elsewhere, and in good faith become the citizen of some other State of this Union, or the citizen or subject of a foreign state or sovereign, he shall not, while the citizen of another State, or the citizen or subject of a foreign state or sovereign be deemed a citizen of this State. (V. C. 1887, ch. 6, § 41.) But no such act of becoming the citizen or subject of a foreign state or sovereign, and no act of expatriation (under section 40), shall have any effect if done while this State or the United States shall be at war with any foreign power. (V. C. 1887, ch. 6, § 42.)

- 2ⁱ. Persons Born in any Other State of the Union (including any Territory of the United States, or the District of Columbia), and *resident in Virginia*.

V. C. 1873, ch. 4, § 1; Id. ch. 15, § 9, cl. 1; V. C. 1887, ch. 6, § 39; Id. ch. 2, § 5, cl. 1; Const. U. S. Amendment, XIV., § 1; Towles' Case, 5 Leigh, 748; 2 Stor. Const. § 1693.

- 3ⁱ. Persons, Wheresoever Born, whose Father, or if he be Dead, whose Mother, was a Citizen of Virginia at the Time of his Birth.

V. C. 1873, ch. 4, § 1; V. C. 1887, ch. 6, § 39. But one is not a citizen whose *grandmother* only was a Virginian. (*Barzizas v. Hopkins*, 2 Rand. 276; *Orr v. Hodgson*, 4 Wheat. 460.)

- 4ⁱ. Persons born out of the Limits and Jurisdiction of the United States, whose Fathers at the time of their Birth were Citizens of the United States, such Persons being Residents in Virginia.

See Rev. Stats. U. S. § 1993.

- 5ⁱ. Persons entitled to Citizenship under Former Laws.

See V. C. 1873, ch. 4, § 1; V. C. 1887, ch. 6, § 39.

- 2^h. Naturalized Citizens.

Persons naturalized under the laws of the United States, and *resident in Virginia*, are citizens thereof by the effect of the original Constitution of the United States, empowering Congress to establish a *uniform rule* of naturalization; besides which they are declared in terms to be such by statute with us, and also by Const. U. S. Amendment XIV. (Const. U. S. Art. I., § viii. 4; Id. Amendment XIV., § 1; Id. Art. IV., § ii. 1; Towles' Case, 5 Leigh. 748; V. C. 1873, ch. 4, § 1; V. C. 1887, ch. 6, § 39; 2 Stor. Const. § 1694.)

W. C.

- 1ⁱ. Proceedings for the Purpose of Naturalization.

The power of naturalization is vested *exclusively* in Congress, and cannot be exercised by any of the States. (*Chirac v. Chirac*, 2 Wheat. 269; *Barzizas v. Hopkins*, &c., 2 Rand. 285.)

The States, however, are not excluded from allowing aliens *any privileges*, touching the ownership of lands, or participation in the State governments, which they may severally think fit to confer, within their respective limits (constituting them a *kind of denizens*); they only cannot make them *citizens* in such a sense that they shall be citizens of the *United States*. (Rev. Stats. U. S. § 2165; 1 Bright. Dig. 33; 2 Do. 5; 1 Tuck. Com. 63; Barzizas v. Hopkins, 2 Rand. 285; 2 Kent's Com. 64; Dred Scott v. Sandford, 19 How. 393.)

W. C.

1^k. Character of the Party to be naturalized.

Any alien friend, who is a free white person, or a person of African nativity, or of African descent, may be admitted to become a citizen of the United States, in the manner presently to be described, and not otherwise. (Rev. Stats. U. S. §§ 2165, 2169, 2171.) But the party may be a *married woman*, and she may be naturalized without the concurrence of her husband. (Priest v. Cummings, 16 Wend. 617; Shanks v. Dupont, 3 Pet. 248.)

2^k. Preliminary Declaration of the Party to be Naturalized.

This preliminary declaration is to be made on oath before some court of record, State or Federal, or before the clerk of such court, *two years at least* before his admission as a citizen, that it is *bona fide* his intention to become a citizen of the United States, and to renounce for ever all allegiance to any foreign prince or state, and particularly by name to the prince or state whereof he is at the time a subject. (Rev. Stats. U. S. § 2165; Suppt. Rev. Stats. U. S. p. 200.)

This preliminary declaration may be dispensed with where the alien has resided within the United States *three years* before attaining his age. But he must make the declaration thus required at the time of his admission; and must then further declare on oath and *prove* to the satisfaction of the court that for two years next preceding it has been his *bona fide* intention to become a citizen of the United States; and he must in all other respects comply with the naturalization laws. (Rev. Stats. U. S. § 2167.)

3^k. Proceedings when Alien *applies to be admitted a Citizen*; W. C.

1^l. Before what Courts Proceedings may be had.

Before any court of record, *State or Federal*, and such court acts *judicially* in admitting the person to citizenship. (Rev. Stats. U. S. §§ 2165, &c.)

2^l. Declaration to be made by the Party at the *Time of Admission* as a Citizen.

The party must declare on oath that he will support the Constitution of the United States, and that he renounces all allegiance and fidelity to every foreign prince or state, and particularly by name to the prince or state of which he is then a subject; which proceedings are to be recorded. (Rev. Stats. U. S. § 2165.)

3^l. Proof to be Furnished by the Party Applying to be Admitted a Citizen.

The party must prove that he has made the preliminary declaration required, which must be proved *by the record*; and he must prove *by perjury* that he has *resided* within the United States five years, at least, and within the State or Territory where the court sits one year, at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the same. (Rev. Stats. U. S. §§ 2165, 2170, 2174.)

4^l. Renunciation by the Party of his Title or Order of Nobility, if he has any.

See Rev. Stats. U. S. § 2165.

4^k. Effect of Sentence Admitting an Alien to Citizenship.

The sentence is *conclusive evidence* of the facts it recites, and on which it is founded, nor can any inquiry be gone into behind it. The alien becomes, by the sentence, entitled to all the privileges of a natural-born subject, except that he can never be President of the United States, nor can he be a member of the House of Representatives until he has been a citizen *seven* years, nor of the Senate until after *nine* years. (Campbell v. Gordon, 6 Cr. 182; Starke v. Ches. Insur. Co., 7 Cr. 420; Spratt v. Spratt, 4 Pet. 393; Towles' Case, 5 Leigh, 743; Const. U. S. Art. I., § ii. 2. and § iii. 3.)

2ⁱ. Instances of Irregular Naturalization; w. c.

1^k. The Minor Children of Duly Naturalized Aliens.

If *dwelling* in the United States, they shall be considered citizens. (Rev. Stats. U. S. § 2172; Campbell v. Gordon, 6 Cr. 177; State v. Penny, 5 Eng. (Ark.) 621.)

2^k. The Wife of a Citizen, Native or Naturalized.

If capable of naturalization, she is to be deemed a citizen, provided (it is said), she does not continue, throughout her husband's life-time, a *non-resident* of the United States. (Rev. Stats. U. S. § 1994; Kelly v. Owen, 7 Wal. 498; Burton v. Burton, 38 N. Y. 873; S. C. 40 N. Y.)

The Supreme Court of the United States, in the case of Kelly v. Owen, above cited, expressed the opinion,

which seems a very reasonable one, that as the statute requires that the woman "might herself be lawfully naturalized," she must possess all the attributes prescribed for naturalization, such as being a *free white woman*, or one of *African nativity or descent*, and being a *resident* at some time during her coverture in the United States, etc. The contrary, however, in respect of *residence*, was held in *Kane v. McCarthy*, 63 N. C. 299. In that case it was decided that a white woman, an alien-born, married to a citizen of the United States, was herself a citizen, though she had always resided abroad.

- 3^k. The Widow and Children of One who has made the Preliminary Declaration, but who dies before Admission as a Citizen.

They are deemed citizens upon taking the oath prescribed by law. (Rev. Stats. U. S. § 2168.)

- 4^k. Aliens above Twenty-One Years of Age, who have Enlisted, or may Enlist in the Military Service of the United States, and been Honorably Discharged.

They are to be admitted to citizenship without the preliminary declaration, upon proof of *one year's* residence, and good moral character, and without qualification *as to race*. (Rev. Stats. U. S. § 2166.)

- 3^e. The Rights of the People, as Aliens or Citizens; w. c.

- 1^f. Political Rights.

These belong properly to *citizens only*, by the very nature of society, it being a matter of vital concern that they should not be exercised by persons who may not only have no interest in the welfare of the State, but may be actually interested in its ruin. The United States Constitution, in declaring (Art. IV. § ii. 1), that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," must be understood to contemplate no other rights than those of *property and person*. (*Murray v. McCarty*, 2 Munf. 398; *Corfield v. Coryell*, 4 Wash. C. Ct. 380; *Conner v. Elliott*, 18 How. 591.)

- 2^f. Rights of Property; w. c.

- 1^g. Rights Touching *Personal* Property; w. c.

- 1^h. Rights to Personal Property, as Respects Aliens, &c.

An alien-*friend* may acquire and hold property in goods, money, and other movable effects, including also *choses in action*, or debts, etc., and may secure the debts due him by mortgage, deed of trust, or other lien upon lands, such lien being only an *incident* to the debt, and so partaking, in the view of a court of equity, of its nature. And in like manner, as equity considers that as done which is agreed or ordered to be done, if land be directed (*e. g.*, by will), to be sold, and the proceeds to go to an alien, it will

be deemed a bequest *of the money*, and so will be valid. (1 Bl. Com. 372; Hughes v. Edwards, 9 Wheat. 489; Com'th v. Devees of Martin, 5 Munt. 117; Com'th v. Selden, Id. 160; Craig v. Leslie, 3 Wheat. 576.)

This liberality as to personalty is extended to aliens, because it is at once safe, and promotive of the interests of trade; and for a like reason, an *alien-friend* may hire a house for his *habitation*, although the common law rigorously forbade him to acquire any further interest *in lands*. (1 Bl. Com. 372.)

From obvious considerations of policy, an *alien-enemy* is allowed to enter into no contract with a citizen, save only a contract for the *ransom of ships* captured at sea; nor can any contract with an alien-enemy, although entered into before the war, be enforced whilst the war is in progress. The hostile alienage, in the one case, is a *plea in bar*, and in the other, a *plea in suspension* of the action. And similar disabilities apply to a neutral, and even to a citizen *domiciled* in the enemy's country. Nor is there any difference in this particular between a civil and a national war. (1 Tuck. Com. 69, B. I.; 1 Bl. Com. 373, and n's, (13) and (14); Bagwell v. Babe, 1 Rand. 272; Bac. Abr. Aliens, (D.); 1 Th. Co. Lit. 93, and n. (H.); 1 Rob. Pr. (2nd ed.) 298 '9; 5 Do. 31; Billgerry v. Branch, 19 Grat. 393; Manhattan Ins. Co. v. Warwick, 20 Grat. 393; Hale v. Wall, 22 Grat. 424; The Rapid, 8 Cr. 155; Jecker v. Montgomery, 18 How. 110; U. States v. Grossmeyer, 9 Wal. 72; Montgomery v. U. States, 15 Wal. 395.)

2^h. Mode whereby an Alien is to Dispose of his Personal Property.

The disposition must be regulated by the *law of his domicile* (*lex domicilii*), or permanent residence at the time of the disposition, *i. e.*, if the disposition be *by will*, at the *time of his death*. (1 Tuck. Com. p. 69, B. I.; V. C. 1873, ch. 118, § 6; V. C. 1887, ch. 112, § 2516; Stor. Confl. L. § 380; Bac. Abr. Aliens, (C. 2).)

2^g. Rights of Aliens Touching *Real Property*; w. c.

1^h. History of the Doctrine Touching Rights of Aliens to Real Property.

There is a diversity of opinion as to the origin of the disabilities of aliens touching lands. By some it is referred to the time of Henry II., when a law was made, at the parliament of Wallingford, for the expulsion of strangers, in order to draw away the Flemings and Picards, who were brought into England by the wars of King Stephen. Others have thought, apparently with better reason, that it is an original branch of the *feudal law*, by which no one could hold lands without being obliged to fealty to him of whom they were holden, so

that an alien who owed a previous faith to another prince could not lawfully take another oath of fidelity. Some restraints, however, have been laid upon aliens by the laws of almost all countries, as was done, for example, among the Romans. (Bac. Abr. Aliens, (C).)

2^h. Rights to Real Property, as Respects Aliens; w. c.

1ⁱ. Doctrine at *Common Law*; w. c.

1^k. Disabilities of Aliens, at Common Law, as it Respects Lands.

Aliens, even *alien-enemies*, may *purchase* lands at common law (that is, acquire them by their own act, *e.g.* by *conveyance*, &c.), but cannot *hold* them, that is, they are liable to escheat to the Crown. But an alien cannot acquire lands by *descent*, or other operation of law (*e. g.*, by dower or curtesy), because the law will not do so vain a thing as to cast the title upon one in order to subject it immediately to escheat. The incapacity of aliens to *hold* is applicable, not only to estates of *freehold* (*i. e.*, of indeterminate duration), but also to estates *for years*, save only that an alien engaged in trade may *hire a house for habitation*; but it is only a personal privilege in promotion of trade, so that, if he leave the kingdom, or die, the premises pass to the king, and not to his assignees, or personal representatives. The incapacity extends to *equitable* as well as *legal* titles; and hence cannot be avoided by causing the conveyance to be made *to a trustee*, in trust for the alien. The mischiefs being the same, the trust-estate escheats to the Crown, just as a legal estate would do.

It seems that, at common law, if lands were vested in an *alien trustee*, not only was the legal estate liable to escheat, but it escheated *discharged of the trust*, upon the frivolous technical reason, that the Crown could not be *compelled* to execute the trust, and that, in case of escheat, the lord held *above the trust*, by a condition in law, tacitly annexed to the estate in its inception. It is otherwise in Virginia by statute. The mere legal title, such as is vested in a trustee, does not escheat. (V. C. 1873, ch. 109, § 25; V. C. 1887, ch. 105, § 2396.)

Since an alien cannot himself inherit, so neither can he transmit inheritance, whatever interest he may have being subject to the paramount right of escheat in the Crown. Hence, if the son be an alien, the native-born grandfather cannot transmit the inheritance to the native-born grandson, because it must come *through the son*, whose alienage arrests it. But if a father be an alien, and *two brothers* be native-born, the brothers may inherit one to the other, because (contrary to what was once thought) the descent is *immediate*, and

not through the father. (1 Bl. Com. 372, & n. 65 to 69; Bac. Abr. Aliens, (C.); Id. Uses, (E.), and (E. I.); Hubbard v. Goodwin, 3 Leigh, 508; Com. Dig. Alien, (C. 2) and (C. 3); 1 Tuck. Com. 65 & seq., B. 1; Gilb. Uses, 43; Id. 204; Id. 10, & n. 106; Id. 171 '2; 2 Fombl. Eq. 139, n. (a); Id. 167, n. (a).)

2^k. Reasons for the Common Law Disabilities of Aliens.

See 1 Bl. Com. 372; Calvin's Case, 7 Co. 18, b; Hubbard v. Goodwin, 3 Leigh, 510, 515; w. c.

1^l. The Alien would owe a Divided Allegiance or Duty, partly to his own Country, and partly to the Country where the Land is.

Such "half-faced fellowship" is undesirable to either country.

2^l. The State might thereby be Subjected to *Foreign Influence*, Power being ever the Concomitant of Property.

i. g., In the case of Poland. (1 Bl. Com. 372, n. 8.)

3^l. The State would be Weakened by the Diversion abroad of a large Portion of the Products of its Soil.

i. g., In the case of Ireland.

3^k. Escheat of Lands Acquired by Aliens.

Whether the title be *legal* or *equitable*, it is liable, as above stated (*supra*, pp. 164, 165, 1^k), to be escheated to the Crown; but this can only be done by *office found*, (*i. e.* by inquisition by a jury, as already explained, (*Ante*, p. 151, &c., 2ⁱ), or in case the title is *equitable*, by some equivalent proceeding in a *court of equity*, *e. g.*, by bill in equity, instituted in either case by the escheator, in the name of the commonwealth. Until office found, &c., the alien is entitled to enjoy the profits, and to hold against the world, even against the commonwealth itself. Nay, even after office found, if the possession *be not vacant*, the commonwealth must, by its officer, *enter upon the lands*, before the possession *in deed* can be adjudged in it. If the *possession be vacant*, there must still be an *office*, not indeed to *vest the right*, but the *possession*. (Hubbard v. Goodwin, 3 Leigh, 482; Com'th v. Martin's Devisees, 5 Munf. 117; Craig v. Leslie, 3 Wheat. 589; Governor's Heirs v. Robertson, 11 Wheat. 356; Fairfax v. Hunter, 7 Cr. 620; Page's Case, 5 Co. 52; 1 Th. Co. Lit. 91, & n. (9).)

2ⁱ. Doctrine *by Statute*, in Virginia, touching Alien's Rights to Real Property; w. c.

1^k. Disabilities of Aliens, as respects Lands, in Virginia.

The rigor of the common law has been gradually relaxed, as the importance of promoting immigration has

been more appreciated, until at length it is provided that "an alien, *not an enemy*, may acquire by purchase or *descent*, and *may hold*, real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." (V. C. 1873, ch. 4, § 18; V. C. 1887, ch. 6, § 43.) And by Article 9 of the treaty of 1794 with Great Britain (*Jay's treaty*), it is stipulated that British subjects then holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, shall not be *considered as aliens*, and conversely as to American subjects, in respect to lands in England. (*Stephen's Heirs v. Swann*, 9 Leigh, 444; *Fiott & als. v. Commonwealth*, 12 Grat. 564; *Orr v. Hodgson*, 4 Wheat. 453; *Shanks v. Dupont*, 3 Pet. 242.)

By *statute* the commonwealth is entitled to *equitable* interests acquired by aliens (say, alien enemies) in like manner as to *legal* interests; and on the other hand, the *mere legal* estate vested in an alien, by way of mortgage or in trust, is declared not to be liable to escheat. (V. C. 1873, ch. 109, § 25; V. C. 1887, ch. 105, § 2396.)

With these qualifications the common law, as to the disabilities of aliens, as it respects lands, prevails in Virginia.

2^k. Escheat of Lands Acquired by Aliens in Virginia.

The doctrine is the same as at common law, with the qualifications as to the disabilities of aliens, stated *Supra*, 1^k. See *Supra*, p. 165, 3^k.

3ⁱ. Doctrine in England and in the United States respectively, touching the Rights to Real Property, of the Subjects of the Two Countries, severally, in the other, after the Revolution of 1776; w. c.

1^k. The *Period of Separation* of these States from the Mother-Country.

The United States reckon it to be 4th July, 1776, Great Britain 3d September, 1783, the date of the treaty of peace. (*Inglis v. Trustees of Sailor's Snug Harbor* 3 Pet. 99, 121; 2 Kent's Com. 59, 60.)

But it seems agreed that the treaty of peace of 3d September, 1783, finally determined the allegiance of all persons as due to that party to which they were *at that time adhering*. (*Shanks v. Dupont*, 3 Pet. 243; *Kilham v. Ward*, 2 Mass. 236; *Gardner v. Ward*, Id. 244, note; *Doe v. Acklam*, 2 B. & Cr. (9 E. C. L.) 779; *Doe v. Mulcaster*, 5 Do. (12 E. C. L.) 771; 2 Kent's Com. 60.)

2^k. The Persons whose Rights are concerned.

The persons whose rights are concerned are those

born before the separation (*ante-nati*), and not such as were born afterwards (*post-nati*). (1 Tuck. Com. 60 to 62, B. I.; 2 Kent's Com. 56 and seq.)

3^d. The Rights which are Involved in the Controversy.

Not rights *vested and existing* at the period of separation (which were in no wise affected by the mere change of political relations, however they may, in some instances, have been confiscated during the war of 1776 by *special legislative acts*), but rights to lands which accrued *by descent subsequent to the separation*, and which are not protected by the 9th Article of the treaty (*Jay's*) of 1794. (Calvin's Case, 7 Co. 27^b; Doe v. Acklam, 2 B. & Cr. (9 E. C. L.) 779; Terret v. Taylor, 9 Cr. 50; United States v. Percheman, 7 Pet. 56.)

The legislation of Virginia in regard to British aliens, pending the revolution, is stated in Read v. Read, 5 Call, 189; Marshall v. Conrad, Id. 364; Com'th v. Bristow, 6 Call, 6; Hunter v. Fairfax' Devisees, 1 Munf. 218.

The 9th Article of the treaty with Great Britain, of 1794, was applicable to all the subjects of Great Britain and the United States, at that time *holding (i. e., having title)* to lands in either country, whether derived by *purchase or descent*, and confirmed such titles as if they had been respectively citizens; but it embraced only the subjects of the two countries, and applied only to titles *then existing*, and not to those *subsequently acquired*. (Harden v. Fisher, 1 Wheat. 300; Orr v. Hodgson, 4 Wheat. 453; Blight's Lessee v. Rochester, 7 Wheat. 353; Hughes v. Edwards & ux, 9 Wheat. 480; Fiott & als. v. Com'th, 12 Grat. 564.)

4th. The Doctrine in Respect to the Rights Involved in the Controversy; w. c.

1st. The View of the Courts in the United States; w. c.

1^m. As regards English *Ante-nati*, claiming Land in Virginia.

The view of the American courts was that such persons were not born *within the ligeance* of these States, which did not then exist as States, and therefore that such persons are aliens. (Read v. Read, 5 Call, 189; Hunter v. Fairfax' Devisees, 1 Munf. 218; Dawson's Lessee v. Godfrey, 4 Cr. 321.)

2^m. As regards American *Ante-nati*, claiming Lands in Great Britain.

The view was that, being born *within the ligeance* of the British Crown, they are entitled to inherit lands in Great Britain, in consequence of the common law doctrine to which England is committed, that a man can never *put off his allegiance*, or be deprived of the benefit of it, save for a crime. (*Cases supra*, 1^m).

As the American courts cannot be called to pronounce *directly* upon the titles to English lands, this latter view has always been merely speculative, and rather in the nature of an *argumentum ad hominem*, addressed to Great Britain. It seems to have yielded to the more reasonable doctrine stated *supra*, 1^k.

2^l. The View taken by the Courts of England.

The English view is that, although the subjects of the two countries owed a common allegiance to the British Crown prior to the separation, and might mutually inherit; and although allegiance is indissoluble, *by the act of the subject alone*, yet there was never any doubt that subjects *might be discharged* by consent of the government; that the treaty of peace of 3d September, 1783, by recognizing the independence of the United States, had determined the English citizenship of all who then adhered to those States; and that American *ante-nati* were thenceforward, like the *post-nati*, aliens to Great Britain, unless they manifested an election to be British subjects, by forthwith leaving the United States, and coming to reside within the dominions of the mother-country. (Doe v. Acklam, 2 B. & Cr. (9 E. C. L.) 779; Doe v. Mulcaster, 5 B. & Cr. (12 E. C. L.) 771; Bac. Abr. Aliens, (A.).)

CHAPTER XI.

OF THE CLERGY.

4^e. The Several Classes of the People in England, as *Clergy* or *Laity*; w. c.

1^f. The *Clergy*.

The clergy will comprehend all persons in holy orders, and in ecclesiastical offices; namely, (1), Archbishops; (2), Bishops; (3), Dean and Chapters; (4), Archdeacons; (5), Rural Deans; (6), Parsons and Vicars; (7), Curates; (8), Churchwardens; and (9), Parish clerks and sextons. (1 Bl. Com. 376 & seq.

w. c.

1^g. Archbishops.

There are two arch-bishops, the one of Canterbury, and the other of York; the former is styled "Metropolitan and Primate of all England," and the latter "Primate and Metropolitan of England." They are called *archbishops*, in respect

of the bishops under them, and *metropolitans*, because they were consecrated at first in the metropolis of the *provinces*. The archbishop of Canterbury has under him, in his province, twenty-one bishops of dioceses, and the Archbishop of York seven. The Archbishop of Canterbury has the precedence of all the clergy, and is the *first peer* of the realm. The Archbishop of York is next of the clergy, and has precedence also of all dukes not of the blood royal, and of all the great officers of the State, except the lord chancellor. (1 Bl. Com. 380, n's (9) and (10);)

W. C.

1^h. Method of Appointment of an Archbishop.

An archbishop is elected by the *chapter of his cathedral church*, by virtue of a license from the Crown, which is accompanied by a royal letter-missive, *naming the person to be chosen*. The appointment is signified by the king's letters patent to the other archbishop and two bishops, or to four bishops, commanding them, without delay, to confirm, invest, and consecrate the person. (1 Bl. Com. 379 '80.)

2^h. The Archbishop's Rights and Duties.

It belongs to an archbishop to inspect the bishops and inferior clergy of his province, and to "*deprive*" any of them for notorious cause; to assemble the clergy of his province in *convocation* upon receipt of the king's writ: to have cognizance of appeals from inferior jurisdictions within his province; and the Archbishop of Canterbury has power to grant dispensations in any case not contrary to Scripture (including special licenses to marry at any *place or time*), where the pope used to grant them: and, *by custom*, to crown the kings and queens of the realm. (1 Bl. Com. 380 '81, and n. (11) to (15).)

3^h. The Manner wherein the Archbishop's Office may Cease.

The archbishop's office may cease by death, deprivation for any very gross and notorious crime, and also by resignation, which must be to the *sovereign in person*, as his only superior. (1 Bl. Com. 382.)

2^g. Bishops: W. C.

1^h. Method of Appointment of a Bishop.

A bishop is elected by the *chapter of his cathedral church*, as in case of an archbishop. The appointment is signified by the king's letters-patent to the archbishop, who must immediately confirm, invest, and consecrate the person elected. (1 Bl. Com. 379 '80.)

2^h. The Bishop's Rights and Duties.

A bishop's functions, besides the administration of certain ordinances peculiar to his order (*e. g., confirmation*), consist in inspecting the manners of the people and clergy of his diocese, and correcting what is amiss, by ecclesiastical

tical censures. To this end, he may visit every part of his diocese, has *several courts* under him, presided over by his chancellor, and is assisted in his administration, also, by his *arch-deacons, dean and chapter*, and *vicar-general*. He also institutes to all benefices in his diocese; consecrates churches; suspends and excommunicates evil-livers; and, until recently, granted administration and probate of wills, and decided divorce and other matrimonial causes. This last function is now transferred to secular courts, called *courts of Probate*, and *courts of Divorce and Matrimonial Causes*, created for the purpose, by 20 and 21, and 21 and 22 Vict. (1 Bl. Com. 882, n. (16) and (17); Williams on Pers'l Prop. 305, 328.)

3^h. The Manner wherein the Bishop's Office may Cease.

A bishop's office may cease by death, by deprivation for any very gross and notorious crime, and also by resignation, which is to the *archbishop*, as his next superior. (1 Bl. Com. 382.)

3^g. Deans and Chapters.

The Dean and Chapter constitute the bishop's *council*, to assist with their advice in the ecclesiastical and secular concerns of the see. They originated in the reservation of certain of the clergy, when the rest were settled in their several parishes, in order to celebrate divine service in the bishop's cathedral. The chief of these had the name of *decanus*, or dean, being probably at first appointed to superintend *ten canons* or *prebendaries*. (1 Bl. Com. 382.)

W. C.

1^h. Method of *Appointment* of Dean and Chapter.

The chapter, consisting of *canons* or *prebendaries*, are sometimes appointed by the Crown, sometimes by the bishop, and sometimes elected by each other. The deans of the ancient chapters are elected by the chapter, upon a *conge d'elire* (or license to elect), from the king, accompanied by letters-missive of recommendation, as in case of bishops; but in the modern chapters, founded by Henry VIII., out of the spoils of the dissolved monasteries (of which there are said to be thirteen), the deanery is *donative* (*i. e.*, is merely in the gift of the Crown, without the intervention of any other authority), and the installation is simply in pursuance of the king's letters-patent. (1 Bl. Com. 382-'83, and n. (19); 1 Th. Co. Lit. 98-'9, and n. (7); 2 Bl. Com. 23.)

2^h. The Rights and Duties of the Dean and Chapter.

The dean and chapter are the *nominal electors* of the bishop, and at common law their confirmation was necessary to his grants, although it is otherwise by 32 Hen. VIII. c. 28. (1 Bl. Com. 383.)

3^h. The Manner wherein the Office of the Dean, and of any Member of the Chapter, may Cease.

The office of the dean and of any member of the chapter may cease by death, deprivation, resignation to the king or bishop, or becoming a bishop. (1 Bl. Com. 383.)

4^g. Archdeacons.

The arch-deacon is a subordinate of the bishop, having a kind of episcopal authority over the whole, or some *peculiar* part of the diocese. (1 Bl. Com. 383.)

W. C.

1^h. Method of *Appointment* of an Archdeacon.

An archdeacon is usually appointed by the bishop himself, or if by a *layman*, the bishop, upon presentation by the patron, *institutes* him, and the dean and chapter *induct* him. (1 Bl. Com. 383, and n. 22.)

2^h. The Archdeacon's Rights and Duties.

The archdeacon's authority, in modern times, is independent of and distinct from that of the bishop (although in theory the bishop's subordinate); and he therefore visits the clergy, and has his *separate court* for the punishment of offenders by spiritual censures, and for hearing other ecclesiastical causes, but with an appeal to the bishop's court. (1 Bl. Com. 383; 3 Do. 64; 3 Steph. Com. 69.)

5^g. Rural Deans.

Rural deans are ancient officers of the church, but now disused, although *deaneries* still subsist as an ecclesiastical division of territory. They were *deputies of the bishop*, who appointed them, in order to inspect the conduct of the parochial clergy, and examine candidates for confirmation, etc.; and were armed with an inferior degree of judicial and coercive authority. (1 Bl. Com. 383-4.)

6^g. Parsons and Vicars of Churches; W. C.

1^h. Parsons.

The parson (*persona ecclesiæ*) is the *personification* of the visible church. He is a *sole body-corporate*, has perpetual succession, and enjoys *full possession of all the rights* of a parochial church; *e. g.*, glebe, parsonage, tithes, etc. (1 Bl. Com. 384, &c.)

W. C.

1^h. Method of *Appointment* of Parsons.

Four requisites are *generally* necessary to the appointment of a parson, *viz.*, holy orders (as deacon or priest), presentation, institution, and induction. The *presentation* to the bishop may be by the lay-patron (when the *advowson* or right to present is said to be *presentative*); or the right may be in the bishop himself (when it is said to be *collative*); or, lastly, no presentation to the bishop may be required (in which case it is called *donative*.) The *institution* is the acceptance of the candidate by the bishop

himself; and *induction* is performed by a mandate from the bishop to the archdeacon, who usually commits it to another clergyman. (1 Bl. Com. 388 to 391.)

2^d. The Rights and Duties of Parsons.

Parsons are entitled to the glebe, to the parsonage, to tithes, and other ecclesiastical dues; and it is their duty to *reside* in their parishes, and in the *parsonage* thereof; to perform divine service at the appointed times, and to instruct the people in religion; and to exercise the duties of hospitality. (1 Bl. Com. 391-'2.)

3^d. The Manner wherein the Parson's Office may Cease.

The parson's office may cease by death, by deprivation, by cession in taking another benefice, and by consecration as a bishop; but it may be allowed, *by dispensation*, to hold two or more benefices at once, *in commendam*—i. e., as a living *commended* to a parson's care. (1 Bl. Com. 392.)

2^h. Vicars.

When the benefice is perpetually annexed to some *spiritual corporation*, aggregate or sole, which has appropriated the glebe, tithes, and other dues, and employs some priest to perform the requisite parochial duties of a pastor, the person thus employed, or *substituted* (who receives for his compensation an agreed portion of the tithes), is called a *vicar*. (1 Bl. Com. 388.)

The method of appointment of vicars, their duties and rights, and manner wherein the office may cease, are substantially the same as with parsons. (1 Bl. Com. 388 & seq.)

7^g. Curates.

Curates are temporary officiating ministers, in place of the proper incumbent, serving *for a stipend* paid by the parson or vicar who appoints him, the *amount* being settled by the ordinary. This is the lowest degree of the clergy, properly so called, the rest to be named being *ecclesiastical officers* only. (1 Bl. Com. 393-'4.)

8^g. Churchwardens.

Churchwardens are the guardians or keepers of the church edifice, and the representatives of the body of the parish. They are appointed, as the *custom* may direct, by the parson, or by the parish, or sometimes by both; and are a kind of corporation, being capable, by the name of *the churchwardens of such a parish*, to take and hold *chattel-property*, and to bring actions. They have no *interest* in the church, church-yard, or glebe, all of which are vested in the parson, but their office is to repair the church and church-yard (for which purpose they levy a *rate or tax*), to compel the parishioners to attend church; and, in conjunction with the overseers, to take care of the poor, etc. (1 Bl. Com. 394-'5; Bac. Abr. Churchwardens.)

9^c. Parish Clerks and Sextons.

Parish clerks and sextons are appointed generally by the parson, but by custom may be chosen by the inhabitants. Parish clerks were formerly clerks *in orders*, but in modern times are *laymen*. Their principal business is to make the responses in the service; to read the lessons; to sing, or lead in the singing of the psalms and hymns, etc.

Sextons, or *sacristans* (from the old words, *seysten*, *segerstane*, the keeper of holy things), are employed to attend the church building, and keep it in fit condition; to ring the church bell, etc. (1 Bl. Com. 395; Jac. L. Dict'y, *Parish Clerk and Sacristan*.)

CHAPTER XII.

OF THE CIVIL STATE.

2^d. The Laity.

Such of the people as are not comprehended under the designation of *Clergy* may be divided into three distinct states, the *Civil*, the *Military*, and the *Maritime*. (1 Bl. Com. 396.)

W. C.

1st. The Civil State.

The civil state consists of the nobility and the commonalty. (1 Bl. Com. 396.)

W. C.

1^h. The Nobility.

The king is the fountain of honor, and may institute and confer titles at his pleasure. Those at present in use are of unequal antiquity. They are dukes, marquises, earls, viscounts, and barons; all of whom, though differing in degree amongst themselves, yet as compared with the commonalty, are *equals*, and so are styled *peers*. (1 Bl. Com. 396.)

W. C.

1ⁱ. The Several Ranks of Nobility: W. C.1^k. Dukes.

This title, though inferior to some in antiquity, is superior to all in rank, being the first in dignity after the royal family. Among the Saxons, it was frequent, under the appellation of *herezoga*, corresponding to the Latin *duces*, leaders of armies. After the Norman conquest, the kings of England, being themselves dukes of Normandy, would not honor any *subject* with the title of duke, until Edward III. created his son, Edward the Black Prince, Duke of Cornwall; and many of the royal family had afterwards similar honors bestowed on them.

In the reign of Elizabeth the title became extinct, but was revived by her successor, James I., in the person of his favorite, George Villiers, whom he created Duke of Buckingham. (1 Bl. Com. 397.)

2^k. Marquis.

His office (for dignity and duty formerly went together), was to guard the frontiers (*marches*) of the kingdom, and therefore he was styled a *lord marcher* or *marquis*. (1 Bl. Com. 397.)

3^k. Earl.

The title of earl is so ancient that its original is not traceable. By the Saxons, a person of this dignity was called *ealderman*, (equivalent to *senior*, or *senator*, amongst the Romans); and also *scire-man*, because he had charge of a *shire* or county. The Danes changed the designation to *eorle*, which seems in their language to have had a like meaning. In Latin he is called *comes*, as being the king's attendant; and in French, *count*, whence his shire was called *county*, the present chief-officer thereof being called, as has been seen, *vice-comes*, as having been originally the deputy of the *comes*. The name, *earl*, is now a *mere title*, wholly disconnected from any office or jurisdiction whatsoever. (1 Bl. Com. 398.)

4^k. Viscount.

In Latin, *vice-comes* was made an *arbitrary title* of honor, without any pretence of office attached, 18 Hen. VI. (A. D. 1440). (1 Bl. Com. 398.)

5^k. Baron.

Baron was the most universal title of nobility, originally annexed to all the superior ranks of the peerage, but in process of time separated from them, by being limited to different lines of heirs. Barons are supposed to have corresponded originally with the *lords of manors*, whence the manorial court is styled the *court-baron*. (1 Bl. Com. 399.)

2ⁱ. Modes of Creating Peers.

Peers are created by *writ* or by *letters-patent*, actual, or presumed from prescription; by *writ*, which is a king's letter, summoning one to attend the House of Peers, by the style and title which the king is pleased to confer; by *letters-patent*, whereby the dignity enures to a man and his heirs, or for life, according to the limitation contained therein. (1 Bl. Com. 400.)

3ⁱ. Principal Incidents Attending Nobility.

Besides being a member of Parliament, and an hereditary counsellor of the Crown, a nobleman is entitled to be tried upon criminal charges—at least for treason or felony—by his *peers*; cannot be arrested in civil cases; answers bills in equity upon his *honor*, not upon oath; when sit-

ting in judgment, gives his verdict, not on oath, but *on his honor*; and is entitled to have those who malign him punished with peculiar severity, as guilty of *scandalum magnatum*. (1 Bl. Com. 402.)

4ⁱ. Modes whereby a Peer may Lose his Nobility.

Only by his death, by attainder, or by act of parliament. (1 Bl. Com. 402.)

2^b. The Commonalty.

Like the nobility, the commonalty is divided into several degrees, yet all commoners are in law *peers* (or equals) in respect to their want of nobility. (1 Bl. Com. 403.)

Under the head of the Commonalty we may note, (1) The vi-dame or valvasor; (2), Knights of various names and ranks; (3), Names and titles of worship, not of dignity; and (4), Tradesmen, artificers, and laborers;

W. C.

1ⁱ. Vi-dame (*vice-dominus*), or Valvasor.

An order quite out of use, and their original or ancient office not understood. (1 Bl. Com. 403; Id. 347. n. 23.)

2ⁱ. Knights of Various Names and Ranks.

Knights are called in Latin *equites aurati*, because they served on horse-back, and wore *gibbed* spurs. In English law they are styled *milites*, because of the military service to which their feudal tenures obliged them. Every one who held a *knight's fee* (according to some 680, or to others 800 acres, but more probably of the *annual value*, in the time of Ed. I., of £20, (1 Th. Co. Lit. 210. 11.) was obliged, by the feudal law, to be *knighted*, or to pay a fine to the king: an old usage which Charles I. gave great offence by attempting to revive. (1 Bl. Com. 404.)

W. C.

1^k. Knights of the Order of St. George, or *of the Garter*.

Instituted by Edward III. (A. D. 1349). (1 Bl. Com. 403; 1 Rap. Eng. B. X.)

2^k. Knight-Banneret.

Apparently so called because originally created by the king in person on the field, under the *royal banners*, in time of war. (1 Bl. Com. 403.)

3^k. Baronet.

Instituted by James I. (A. D. 1611), to raise a competent sum (the *honor being sold*!) to defray the charges of reducing the province of Ulster, in Ireland. (1 Bl. Com. 403.)

4^k. Knights of the Bath.

So called from the ceremony of *bathing* the night before creation. Instituted by Henry IV., and revived by George I. (1 Bl. Com. 404.)

5^k. Knight-Bachelor.

The most ancient, and yet the lowest order of knight-

hood. It is at least as early as the time of Alfred, who conferred it on his son Athelstan. (1 Bl. Com. 404.)

3^d. Names and Titles of Worship, not of Dignity.

c. g., gentleman, esquire, yeoman, etc. (1 Bl. Com. 405-6.)

4th. Tradesmen, Artificers, and Laborers.

These designations seem to be resorted to to identify more certainly the person intended in legal, and especially in *criminal*, proceedings. (1 Bl. Com. 407.) It has long ago been provided in Virginia, that no indictment or other accusation shall be quashed or deemed invalid for the omission or mis-statement of the title, occupation, estate or degree of the accused. (V. C. 1873, ch. 201, § 11; V. C. 1887, ch. 196, § 3999.)

CHAPTER XIII.

OF THE MILITARY AND MARITIME STATES.

2nd. The Military State.

This includes the whole of the soldiery, or persons peculiarly selected and set apart for the defence of the realm. (1 Bl. Com. 408 & seq.; 2 Steph. Com. 594 & seq.);

w. c.

1st. Dangers of Standing Armies to a Free State.

In absolute monarchies, which govern principally by fear, standing armies are a necessary element; but in free states, the profession of a soldier is justly an object of jealousy. No man ought to take up arms, except to defend his country, or to vindicate its laws; and when he becomes, for a time, a soldier, he ceases not thereby to be a citizen. Accordingly, the common law knows no such state as that of a *permanent soldier*, and makes no provision for it. It was not until the reign of Henry VII. that the kings of England had so much as a guard about their persons. (1 Bl. Com. 408.)

2nd. Arrangements for National Defence amongst the Anglo-Saxons; *w. c.*

1st. Arrangements amongst the Ancient Germans.

Cæsar and Tacitus relate that the Germans had *dukes* elected by the *people* for their warlike prowess, who *commanded their armies* in war, and kings, who were *hereditary*, to conduct their *civil affairs*. The forces seem to have consisted of the *body of the population*. (1 Bl. Com. 409.)

2^d. Arrangements Perfected by Alfred.

The military force of the kingdom was in the hands of the dukes, or *heretochs*, who were constituted for every

county, of the principal nobility, and such as were most remarkable for being "*sapientes, fideles et amabiles*." They were chosen, like the sheriffs, by the people of the county in full assembly (*folc-mote*), according to that fundamental maxim of the Saxon constitution, that any officer entrusted *with power susceptible of abuse*, and of being perverted to oppress the people, should be chosen by the people themselves. The dukes, however, seem to have possessed a power too independent of the throne, whereby they were occasionally tempted, and enabled, to accomplish the subversion of the royal authority, and even the usurpation of the Crown, as in case of Duke Harold, upon the death of Edward the Confessor. (1 Bl. Com. 408 to 410.)

3^d. Arrangements for National Defence *after the Norman Conquest*; W. C.

1ⁱ. The Feudal Provision for National Defence.

With the Conquest, or at least in consequence of it, the *feudal law* was introduced into England in its rigor, the whole system being on a military plan. The kingdom was divided into *knights' fees*, in number above 60,000, for each of which a soldier was bound to attend the king in war, for not exceeding *forty days* in the year, a term which it was supposed would decide the campaign, and probably the war. In process of time this personal service was exchanged for *pecuniary commutations*, and finally the military part of the system was abolished by Stat. 12 Car. II., c. 24. (1 Bl. Com. 410.)

2ⁱ. Supplemental Provisions for National Defence by early Statutes.

Besides this feudal array, the statutes of 27 Hen. II. (A. D. 1131) and 13 Edw. I., c. 6 (A. D. 1278), aided by subsequent statutes, obliged *every man* to provide himself with suitable arms, in order to keep the peace, but with the *proviso* that he should not be compelled to go *out of the realm* at any rate, nor *out of the shire*, save in case of urgent necessity. Under these statutes it was usual for the Crown, from time to time, to issue *commissions of array*, and to send into every county officers who could be confided in, to muster, and set in military order, the inhabitants of every district; and about the time of Henry VIII., *lieutenants* were introduced as *standing representatives* of the Crown, to keep the counties in military order, whereby the old commissions of array fell into disuse.

These old statutes were all repealed by Statute 1 Jac. I., c. 25, and 21 Jac. I., c. 28 (A. D. 1603 and 1624), and the national defence was left as at common law. (1 Bl. Com. 411.)

- 3^d. Disputes between Charles I. and Parliament as to the Control of the Militia.

Parliament (that is, the *lords and commons*,) not only denied the control of the militia to the king, as his common law prerogative (in which they seem to have been right), but asserted it to be *in the two houses*,—a proposition which, as the two houses, without the king, do not constitute the parliament proper,—*i. e.*, the national legislature,—appears to be untenable. This dispute, it will be remembered, was the immediate cause of the final rupture. (1 Bl. Com. 411-'12; 2 Rap. Eng. 422, ch. xx. (A. D. 1641-'2).)

- 4^h. Modern Provisions for the National Defence; w. c.

- 1ⁱ. Provisions to make the Public Force Available; w. c.

- 1^k. Militia-force.

After the restoration, by Stats. 13 Car. II., c. 6; 14 Car. II., c. 3; and 15 Car. II., c. 5 (A. D. 1662 to 1664), the sole right of the Crown was recognized to *govern and command* the militia, as well as to *organize it*; and these statutes are the foundation, and contain the substance of many subsequent acts for the same purpose. (1 Bl. Com. 412, and n. (14); 2 Steph. Com. 598-'9.)

w. c.

- 1ⁱ. The Compulsory Levy of Militia.

A certain number of the inhabitants of every county are chosen by lot, for five years, and officered by the lord-lieutenant of the county, and other principal landholders, under a commission from the Crown, and are disciplined at stated periods, for the internal defence of the country. They are not compellable in any case to *go out of the realm*, nor *out of the county*, unless in case of invasion or actual rebellion. (1 Bl. Com. 412; 2 Steph. Com. 599.)

- 2ⁱ. The Volunteer Militia.

Originated in the menace of French invasion, in 1803, and is now, for the most part, laid aside, although the laws for its regulation are still unrepealed. (2 Steph. Com. 599.)

- 2^k. The *Standing Forces*.

The occasions of war, especially of *aggressive* war, require soldiers more completely and permanently disciplined than militia, and not restricted as to the *field service*. The military establishment of Great Britain, therefore comprises, even in peace, a large body of regular forces, who are under the command of the Crown. (1 Bl. Com. 413.)

- 2ⁱ. The Provisions to Prevent the Military Force of the Country from being Dangerous.

It can be embodied and governed only in pursuance of

an act of parliament, which is known as the *mutiny act*, and is *annually* enacted, so that the whole army is *ipso facto* disbanded at the end of every year, unless continued by parliament. This annual statute clothes the king with power to make laws (called the *Articles of War*), for the government of the soldiers and of the militia, and to convene *courts-martial*, with jurisdiction to try and punish offences according to the Articles of War, and the provisions of the act. Without the mutiny act, the soldiers could only be proceeded against according to the common law—that is, *by action* for not fulfilling their contract of enlistment, and by prosecution for *assault and battery*, for beating their officers, which, of course, would put an end to all discipline. This obstacle it was which prevented James II. from establishing a standing army, and governing by means of it, as he had designed to do. (1 Bl. Com. 413 & seq.; 2 Steph. Com. 600.)

This martial law, which is thus applied by the potency of an act of parliament, is viewed with great jealousy, and is rigorously confined to persons in *military service*, either as regular soldiers or as militia. (2 Steph. Com. 602.)

3^d. Provision for Disabled Soldiers.

Pensions are provided for the sick, hurt, and maimed; and for such as are worn out in their duty, the royal hospital at *Chelsea*, &c. (1 Bl. Com. 417; 2 Steph. Com. 602-3.)

3^g. The Maritime State.

This includes the persons employed in the royal navy, which has ever been the chief defence and ornament of Great Britain, and as such has been assiduously cultivated from a very early period. So eminent was the naval reputation of England in the twelfth century, that the marine code, known as the "*Laws of Oleron*," which was compiled by Richard I., of England, (A. D. 1194), at the Isle of Oleron, on the coast of France, then part of the possessions of the English Crown, was speedily received by all Europe, and now constitutes the ground of all their maritime constitutions. (1 Bl. Com. 418, & n. (13); 1 Th. Co. Lit. 9, 48; Bac. Abr. Court of Adm. (E).)

W. C.

1^h. The Naval Power of England, cherished and enlarged by the Navigation-Acts.

By these acts the constant increase of mercantile shipping and seamen was immensely and unavoidably promoted, the trade of the country, and especially of the colonies, being thereby more or less *restricted to English ships*, manned chiefly by *English crews*. (1 Bl. Com. 418-19, & n. (14), &c.)

2^h. Modes Adopted to Supply the Royal Navy with Seamen.

The supply is kept up, not by *voluntary enlistments* alone, with many advantages of wages, but also by *impressments*, in pursuance of royal commissions (which, though much complained of, have been adjudged, upon the plea of necessity, to be in accordance with the common law), and by authorizing parishes to bind poor boys apprentices to masters of merchant vessels. (1 Bl. Com. 420-'21; 2 Steph. Com. 604-'5.)

3^h. Laws to Enforce Naval Discipline.

The rules and articles of the naval service, whereby persons connected with it are governed, are set down in certain *permanent acts of parliament*, and are not left, as in case of the army, to executive discretion, under an annual mutiny act. (1 Bl. Com. 421; 2 Steph. Com. 605-'6.)

4^h. Privileges Conferred on Sailors.

Nearly the same as on soldiers; *e. g.*, pensions to the maimed, wounded or superannuated, and a refuge in the royal hospital at *Greenwich*, &c. (1 Bl. Com. 421; 2 Steph. Com. 607.)

CHAPTER XIV.

OF MASTER AND SERVANT.

2^c. The Private Relations, and the Rights and Consequent Duties belonging thereto.

The private relations are those of, (1), Master and servant; (2), Husband and wife; (3), Parent and child; and (4), Guardian and ward;

W. C.

1^d. Master and Servant; w. c.

The relation of master and servant, in its proper and more comprehensive sense, pervades the whole of society, and demands careful consideration. The subject may be presented under the heads following, namely: (1), The definition of a master and of a servant; (2), The several classes of servants; (3), The manner in which the relation of service affects master and servant respectively; (4), The manner in which strangers may be affected by the relation; (5), The doctrine touching the termination of the relation; (6), The doctrine touching the liability of a master where *government* is concerned; (7), The doctrine touching the liability of an employer for the acts and defaults of a *contractor*; (8), The doctrine touching the liability of the owner of real property for its use for hurtful purposes.

W. C.

1°. Definition of a Master, and of a Servant.

A master is one who exercises personal authority or control over another, and that other is his servant. (1 Pars. Com. 86-7.)

2°. The Several Classes of Servants; w. c.

The several classes of servants include, (1), Slaves; (2), Menial servants; (3), Apprentices; (4), Laborers; and (5), Stewards, bailiffs, factors, agents, &c.;

w. c.

1°. Slaves.

Slavery is properly a *state of involuntary servitude for life*. The extent of the master's authority is greater or less, according to the municipal law of each country where such a system prevails. It was never understood in Virginia to confer on the master, as it did by the Roman law, absolute and unlimited power over the *life and limbs* of the slave, and for a century past has been with us little more than an apprenticeship for life, with power in the master to assign it at pleasure.

Slavery existed in England, at common law, under the name of *villinage*; and that country, for a century and a half, was the great patron of the *African slave trade* (the most monstrous wickedness of modern times), and continued it for nearly thirty years after it had been *abolished by Virginia*. (1 Th. Co. Lit. 405 & seq.; 1 Hargr. Jur. Execr's. 18 & seq.; Bract. Lib. IV. fol. 208; Somerset's Case, Loft's Rep. 1, 17; S. C. 20 How. St. Tri. 1; 1 Rob. Pr. (2d ed.) 18, &c.)

The growing density of her population having made it more profitable to *hire laborers* than to *own* them, villinage sunk gradually into disuse, and the English people (like some of our own countrymen), mistaking the promptings of *interest* for those of *moral principle*, as men are prone to do, have loudly applauded their own philanthropy, and have been fain to atone to the world for their very active participation in the worst incidents of slavery by remorseless abuse of Virginia for continuing from necessity to tolerate what *they would not allow her to prevent by law*.

We may note, (1), The origin of slavery in general; (2), The origin of slavery in Virginia, its justification, and its history here; (3), Slavery in its relation to the world; and (4), Who shall be deemed a *negro* or *colored person* in Virginia;

w. c.

1°. The Origin of Slavery in General, and Objections thereto;

w. c.

1^h. Origin of Slavery.

Slavery, which seems to be well nigh as ancient as hu-

man society, is referred by Justinian to three sources, viz., captivity in war, purchase for a price, and birth of a slave-mother. *Servi aut nascuntur aut fiunt. Nascuntur ex ancillis nostris; fiunt aut jure gentium, id est, ex captivitate; aut jure civili.* (1 Th. Co. Lit. 403-'4; Gen. ix. 10, 11; Just. Inst. Lib. I., Tit. iii. § 4.)

2^h. Objections to the Validity of these Sources of Slavery.

Blackstone very justly observes that the three origins of the right of slavery assigned by Justinian are all of them built upon false foundations. As first, *jure gentium*, from captivity in war; as if the conqueror, having spared the life of his captive, has a right to deal with him as he pleases. But war itself is justifiable only on principles of self-preservation, and therefore gives no other right over prisoners, but merely to disable them from harming us, by confining their persons; much less can it give a right to kill, torture, abuse, plunder, or even to enslave an enemy, *when the war is over.*

But, secondly, as to slavery beginning *jure civili*, when one man sells himself to another. If this is meant only of contracts, to serve or work for another, it is very just; but when applied to strict slavery, where the bondsman becomes the property of the master, it is repugnant to sense and reason. Every sale implies a price, an equivalent, or what may possibly be an equivalent to the seller in lieu of what he parts with; but what can possibly be an equivalent for one man's thus surrendering himself up to the absolute disposal of another during his whole life as his property?

Lastly, if slaves cannot be *made*, either *jure gentium*, from captivity in war, nor *jure civili*, by purchase for a price, it is manifest that no one can be a slave *by birth*. (1 Bl. Com. 423; Montesq. Sp. L. B. XV., ch. 2; Vat. B. III., § 152; 1 Hargr. Jur. Ex. 12 & seq.) In its *origin*, therefore, slavery cannot be justified; but when once instituted, and when slaves constitute a considerable part of the population of a State, the continuance of the institution may, and generally will become a political necessity, because more injury would result to the body politic from its precipitate abolition than from its maintenance.

2^g. The Origin of Slavery in Virginia, its Justification, and its History there.

We are to take notice in this connection of, (1), The origin of slavery in Virginia; (2), The justification of slavery in Virginia; (3), The history of slavery in Virginia; and (4), Slavery in its relations to the Federal Government; w. c.

1^h. The Origin of Slavery in Virginia.

In August, 1620, says Beverley, a Dutch man-of-war

landed *twenty negroes* for sale, which were the first of that kind that were carried into the country. (Bev. Va. 35; 1 Rob. Pr. (2d ed.) 15 & seq.)

2^h. The Justification of Slavery in Virginia.

The continuance of slavery in Virginia was justified by an inexorable *political necessity*. It was imposed on the colony, in the first instance, against the earnest and oft-repeated protests of the General Assembly, by the negatives of the King of England, or of his governors, on the laws enacted to prohibit the importation of and traffic in slaves; and the further importation was forbidden, under heavy penalties, within two years after our declaration of independence (*i. e.*, in 1778), almost *thirty years* before it was prohibited by Great Britain, and before New England would consent entirely to forego its profits by allowing the United States to prohibit it. Virginia was thus the *first country* in the world to set the seal of reprobation upon that *opprobrium of modern civilization*, the African slave-trade; and when at length the commonwealth acquired the power to direct her own policy, the number of slaves was so great (exceeding 230,000) as compared with the whites (about 360,000) as to make it alike disastrous to both races to liberate the blacks. (1 Tuck. Com. 75; Dew's Essay on Slavery, 76 & seq.; 3 Ell. Deb. 590, Speech of Patrick Henry.)

3^h. History of Slavery in Virginia.

The history of slavery in Virginia may be briefly presented under the heads following, namely:

- (1), The first progress of slavery in Virginia;
- (2), Efforts of Virginia to arrest the importation of slaves;
- (3), Prohibition of the slave-trade in Virginia;
- (4), What persons were capable of being enslaved;
- (5), Legislation in Virginia touching the rights of a master to slaves;
- (6), Penal legislation in Virginia touching slaves;
- (7), Manumission of slaves by the owner;
- (8), Doctrine as to the liability of the hirer of a slave;
- (9), What persons were slaves in Virginia at the date of the abolition of slavery;
- (10), Propositions from time to time for general emancipation;
- (11), Alarms of servile insurrections in Virginia;
- (12), The abolition of slavery in Virginia;
- (13), The measure of recovery in controversies touching slaves detained or converted prior to abolition;
- (14), Doctrine as to the validity and effect of bonds and notes for slave purchases, &c.;

W. C.

1^l. The First Progress of Slavery in Virginia.

Having originated, as already stated, in 1620, its progress was at first so slow that, in 1671, Sir William Berkeley, then governor of the colony, states the slaves to be only 2,000, out of an entire population of 40,000, and says the importation did not exceed two or three cargoes in seven years. (2 Hen. Stats. 215.)

2ⁱ. Efforts of Virginia to Put a Stop to the Importation of Slaves.

In 1699 the General Assembly commenced the series of restrictive acts (as many as *twenty-six* in all), by which it sought to arrest or discourage the further introduction of slaves, the last being in 1772, which was accompanied by an earnest petition to the throne to "*remove all restraints which inhibited his majesty's governors assenting to such laws as might check so very pernicious a commerce as that of slavery.*" (1 Tuck. Bl. App'x, 51, *note.*) This reasonable petition, like its predecessors, was disregarded; and it serves to show the depth of the general sentiment upon the subject, that the preamble to the State Constitution of 1776 (which has also been the preamble to every succeeding constitution, as it is to the present one) complains of it as one of the acts of "detestable and insupportable tyranny" of the king of Great Britain, that he had prompted our negroes to rise in arms among us,—"*those very negroes whom, by an inhuman use of his negative, he had refused us permission to exclude by law.*" (V. C. 1873, p. 66; V. C. 1887, p. 31; 3 Ell. Deb. 452, 454; Va. Const. 1869, *Preamble.*)

3ⁱ Prohibition of the Slave-Trade, by Virginia.

In October, 1778, an act was passed prohibiting the importation of slaves by *land or water*, under the penalty of £1,000 each, and freedom to the slave; thus giving to the world the *first example* of abrogating this most wicked and pernicious traffic. (9 Hen. Stats. 471.)

4ⁱ. What Persons were Capable of being Enslaved.

No other persons than *negroes and their descendants* were ever slaves in Virginia, except that, in pursuance of several acts of Assembly, from 1676 to 1682, *Indian* captives were for a few years reduced to a like condition; which state of things, however, ceased in 1691 (or, as some say, in 1705), in consequence of an act authorizing a "*free and open trade*" with all Indians whatsoever. (1 Tuck. Bl., Pt. II., App'x, 47; 2 Hen. Stats. 346, 404, 440, 491; 3 Hen. Stats. 69, 447; Robin v. Hardaway, Jeff. Rep. 109; Pallas, &c. v. Hill, &c. 2 Hen. & M. 149; Gregory v. Baugh, 4 Rand. 623, 625, &c.; S. C. 7 Leigh, 681, 684.)

5ⁱ. Legislation in Virginia touching the Rights of Masters to Slaves; W. C.

1^k. Legislation touching the Effect of *Baptism of Slaves*.

It having been adjudged in England, in 5 W. & M. (A. D. 1694), that an action of *trespass* lay to recover the value of negro slaves converted by the wrong-doer to his use, "*because they are heathen, and a man may have property in them*" (Gelly v. Cleve, 1 Lord Raym. 147), a popular inference arose that if negroes *became Christians*, the right of property would cease. The colonial assembly of Virginia, therefore, enacted, in 1705, that if *not Christians in their native country*, nor Turks, nor Moors, in amity with England, it should not prevent their continuing to be slaves, that they were *converted to Christianity* after they were shipped for importation. (3 Hen. Stats. 447 '8; 5 Do. 548.) And in a like spirit of caution, it was enacted, in 1753, that "baptism of slaves does not exempt them from bondage." (6 Hen. Stats. 357.)

2^k. Legislation touching the Effect of a Slave's being Carried to England.

Lord Holt, having held (at some time between 1688 and 1705), contrary to subsequent adjudications (*Post* p. 197), that as soon as a negro sets his foot in England he is immediately, and *ipso facto*, free (Smith v. Brown & Cooper, 2 Salk. 666), the Virginia Assembly enacted, in 1705, that a slave *having been in England* shall not be sufficient to discharge him from slavery *in Virginia*, without proof of his having been actually manumitted there. (3 Hen. Stats. 447; 5 Do. 548; 6 Do. 357; *Post* p. 197.)

6ⁱ. Penal Legislation in Virginia touching Slaves.

It was generally conceived in a humane spirit, but in some particulars evinced in early times a severity and harshness in remarkable contrast with the later periods of the institution;

W. C.

1^k. Act of 1669 touching the Killing of a Slave by his Master or Overseer, whilst under Correction.

By this act it was enacted that the master or overseer should be "acquitted of molestation," "since it cannot be presumed," says the statute, "that premeditated malice should induce any man to *destroy his own estate*." (2 Hen. Stats. 270; Exod. xxi. 20, 21.)

This law, after having been several times re-enacted, was, in 1788, in consequence of an instance of revolting cruelty in a master, repealed, and thenceforth the killing or maiming of a slave was upon the same footing as if committed upon a white freeman. (12 Hen. Stats. 681; 1 Tuck. Bl. 56, and note *.)

2^k. Act of 1705 to Punish Slaves Notoriously and Incor-

rigibly Addicted to *Going Abroad at Night, and Running Away.*

They were to be "*dismembered*," or otherwise punished at the *discretion of the county court, saving life.* (3 Hen. Stats. 461.)

But by act of 1769, this was said to be disproportioned to the offence and *barbarous*, so that the despotic discretion of the county court was somewhat restricted. (8 Hen. Stats. 358.)

- 3^k. Act of 1748 Empowering two Justices of the Peace to *Outlaw Runaway Slaves, Lurking in Swamps, and Stealing Hogs, etc.*

Slaves thus *outlawed* were liable to be *destroyed by any ways or means*, and their value, in such case, was paid out of the *public treasury.* (6 Hen. Stats. 110-11; Bland Papers, p. 17.)

This extravagantly inhuman statute was repealed in 1792. (1 Stats. at Large, (N. S.) 125.)

- 4^k. The Statute Punishing *Cruelty to a Beast* (V. C. 1873, ch. 192, § 15; V. C. 1887, ch. 185, § 3796), did not Punish the *Cruel, Wanton, and Malicious Beating* of a Slave by his *Master.*

If neither *death nor mayhem* ensued, the *law* inflicted no punishment, but left the offender to the "deep and solemn reprobation of the tribunal of public opinion." (Turner's Case, 5 Rand. 686.) However, in Souther's Case (7 Grat. 681), it was held that homicide committed by excessive whipping of a slave, such as was calculated to produce death, was *murder in the first degree*, without regard to the *offender's intention.*

- 7ⁱ. Manumission of Slaves by the Owner; w. c.

- 1^k. State of the Law previous to 1723.

Previous to 1723 manumission was uncontrolled and unregulated, save that the master was required to provide the means of transportation for his manumitted slave out of the country. (3 Hen. Stats. 87.)

- 2^k. State of the Law from 1723 to 1782.

During the period from 1723 to 1782 manumission was wholly prohibited, except for *meritorious services*, to be adjudged by the governor and council. (4 Hen. Stats. 132.)

- 3^k. State of the Law from 1782 to the Abolition of Slavery in 1865.

Manumission, from 1782 to 1865, was freely permitted, with no other qualification than that it should not be to the prejudice of the master's creditors, nor to the detriment of the parish, by throwing upon it one likely to become chargeable *as a pauper.* (11 Hen. Stats. 39; V. C. 1860, ch. 103, §§ 17 to 19.) But in order to prevent

the accumulation of an undesirable population, it was enacted, in 1806, that any emancipated slave remaining in the commonwealth more than twelve months after his right to freedom accrued, should forfeit his right, and be liable to be sold by the overseers of the poor for the benefit of the poor of the county or corporation where he should be found, with reservations in favor of persons of extraordinary merit. (3 Stats. at Large, N. S. 252; 1 R. C. (1819), p. 436; Va. Const. 1851, Art. IV. § 19.)

In order to develop the principles applicable to the the subject, we must observe, (1), The mode of manumission; (2), The effect of a condition annexed to manumission; (3), The doctrine as to the status of the issue of a female emancipated, to take effect at a future time; (4), The doctrine as to allowing slaves an election to be free; (5), The doctrine as to the power of slaves to make contracts; (6), The doctrine as to the mode of a slave recovering freedom; and (7), The doctrine as to the right of a slave recovering his freedom to recover damages;

W. C.

1¹. The Mode of Manumission.

The mode of manumission was by last *will* (in *writing*, since 1850), or by *deed* recorded in the clerk's office of the county or corporation court of the county or corporation wherein the master resided, as deeds of lands are required to be recorded. (V. C. 1860, ch. 103, § 16; *Id.*, ch. 121, §§ 2, 3; *Givins & als. v. Manns*, 6 Munf. 191; *Manns v. Givins & als.* 2 Leigh, 762; *S. C.* 7 Leigh, 689; *Thrift v. Hannah*, 2 Leigh, 300; *Lewis v. Fullerton*, 1 Rand. 15.)

2¹. Effect of Condition Annexed to Manumission, &c.

A condition *precedent* annexed to manumission was valid; and must have been complied with; a condition *subsequent* was void. (*Hepburn v. Dundas*, 13 Grat. 222; *Forward's Adm'r v. Thamer*, 9 Grat. 539; *Osborne & als. v. Taylor's Adm'r & als.*, 12 Grat. 128.)

3¹. Doctrine where Female Slave was Emancipated, to take effect at a *Future Time*, as to the *Status* of the Issue born prior to that Period.

The courts held the issue to be slaves for life, but *by statute* it was enacted that they should be free at the *same period with the mother*. (*Maria v. Surbaugh*, 2 Rand. 229; *Taylor v. Cullins*, 12 Grat. 394; V. C. 1860, ch. 103, § 17.)

4¹. Doctrine as to the Effect of allowing to Slaves an *Election to be Free or not*.

No doubt seems to have been entertained until 1858, of the validity of such a provision (*v. g.*, contained in a

will), and that it was competent for slaves to make such election to be free, or otherwise. (*Pleasants v. Pleasants*, 2 Call, 319; *Elder v. Elder's Ex'or*, 4 Leigh, 252; *Dawson v. Dawson's Ex'or*, 10 Leigh, 602.)

But in 1858 it was held in two cases (contrary, it is believed, to the general sentiment of the profession), that slaves had no *legal capacity to choose*, even to be free, and, therefore, that allowing them such choice was merely vain and inoperative, neither emancipating them nor putting it in their power to be emancipated. (*Bailey & als v. Poindexter's Ex'ors*, 14 Grat. 132; *Williamson & als v. Coalter's Ex'ors & als.*, Id. 394.)

5^l. Doctrine as to the Power of Slaves to *make Contracts*.

It is agreed that slaves have no power to make contracts. Hence, the marriages of slaves are void. (*Coop. Just. Inst.* 411, 420; *Taylor's El. Civ. Law*, 429; *Jackson v. Lurvey*, 5 Cow. (N. Y.) 402; 1 Bish. Marr. & Div. §§ 154 & seq.; 159 & seq.; *Hall v. United States*, 92 U. S. 30.) So also are their contracts with the *master* to buy themselves, although part, or even the whole, of the purchase-money has been paid. But a contract by the master with a *third person* to liberate the slave upon a contingency would probably be valid, and would be enforced in equity at suit of such third person. (*Sawney v. Carter*, 6 Rand. 173; *Stevenson v. Singleton*, 1 Leigh, 172; *Bailey & als. v. Poindexter's Ex'ors*, 14 Grat. 193; *Shue v. Turk*, 15 Grat, 266, 267, 268.)

6^l. Doctrine as to the Mode whereby One held as a Slave might *Recover his Freedom*.

He might sue *in forma pauperis*, in the manner prescribed by the statute (V. C. 1860, ch. 106, §§ 1 to 7), and *not otherwise*; but where there were impediments to a fair trial *at law*, resort might be had, as in other cases, *to equity*. And so slaves emancipated by will might propound it for *probate*. (*Isaac v. Johnson*, 5 Munf. 95; *Lemon v. Reynolds*, Adm'r &c., Id. 532; *Dempsey v. Lawrence*, Gilm. 333; *Talbert, &c. v. Jenny, &c.* 6 Rand. 162; *Dunn v. Amey & als.* 1 Leigh, 465; *Anderson v. Anderson*, 11 Leigh, 616; *Jincey & als. v. Wingfield*, 9 Grat. 708; *Reid v. Blackstone*, 14 Grat. 365-6 *Redford v. Peggy*, 6 Rand. 316; *Manns v. Givins*, 7 Leigh, 689; *Phoebe v. Boggess*, 1 Grat. 129; *Ben Mercer v. Kelso*, 4 Grat. 106; 2 Lom Ex'ors, 337.)

The statutory mode of proceeding was *exclusively* applicable, as above stated, where the person held as a slave prosecuted his suit for freedom, against *him who claimed to be his master*; but if a colored person were deprived of his liberty by one *not claiming him as*

master, he might resort to the same remedies as a white man, *e. g.*, to the writ of *habeas corpus*. (De Lacy v. Antoine & als., 7 Leigh, 443; Ruddle's Ex'or v. Ben, 10 Leigh, 467; Shue v. Turk, 15 Grat. 256, 260.)

7^l. Doctrine as to the Right of a Negro Recovering his Freedom to *Recover Damages*.

He can recover no damages, independently of statute, not *by contract*, for none can be implied in such case, nor as of *natural right*, because, taking one case with another, the expense of rearing, and of supporting in sickness and age, is not more than compensated by the service, nor would it be possible to take the account on any basis of principle. But *by statute* the jury were permitted to allow damages *pending the suit*. (Alfred v. Fitzjames, 3 Esp. 3; Skyring v. Greenwood, 4 B. & Cr. (10 E. C. L.) 281; Pleasants v. Pleasants, 2 Call, 319; Paup v. Mingo, 4 Leigh, 176; Peter v. Hargrave, 5 Grat. 12; V. C. 1860, ch. 106, § 7; Osborne v. Taylor, 12 Grat. 117.)

8^l. Doctrine as to the Liability of the Hirer of a Slave; *w. c.*

1^k. For Safe Return of Slave; *w. c.*

1^l. Where there *was a Contract* for a Certain Measure of Liability.

The liability was of course *regulated by the contract*, but in general, a contract to *return at the end of the year* was construed to mean only to *use due diligence* to that end, so that if the failure to return was occasioned by *no default* of the hirer, as by reason of the slave's death, or his absconding, the hirer was excused. (Harris v. Nicholas, 5 Munf. 483.)

2^l. Where there *was no Contract*.

The liability of the hirer of a slave, in the absence of any special contract, was the same as that of the bailee of any other chattel. The bailment being for the *mutual benefit* of both bailor and bailee, the latter was bound to take *ordinary care*, and if he perverted the slave from the purpose for which he was *professedly hired*, he was liable for *all the consequences arising from the perversion*. (Spencer v. Pilcher, 8 Leigh, 566; Harvey v. Epes, 12 Grat. 153, 172, 176; Harvey v. Skipwith, 16 Grat. 393; Stor. Bailm. §§ 413, 413a, &c.)

It may be added, also, that the hirer of a slave was not at liberty to employ him as the owner might, at his option, *in any way* whatever; and if he put him upon a *dangerous service* not stipulated for, he was answerable for the consequences, although he might appear to have been guilty of no immediate negligence. (Spencer v. Pilcher, 8 Leigh, 566; Harvey v. Epes, 12 Grat. 172, &c.; Randolph v. Hill, 7 Leigh, 383.)

2^k. Doctrine Touching the *Apportionment* of Slave-Hires.

When the slave was *sick* during the year, or *ran away*, or was imprisoned for crime, there was no apportionment, but the *whole hire* was payable; but if he *died* during the year, the hire was apportioned according to the time of the death. (George v. Elliott, 2 Hen. & M. 6; 1 Fonbl. Eq. 376-'7, and *notes*; Scott v. Bartleman, 2 Cr. C. C. 313.)

The same rule, it is believed, holds in respect to free servants hired. Thus, a seaman is entitled to the whole of his wages, though disabled by sickness, even if, by reason of that sickness, he was obliged to be left at a foreign port, and *a fortiori* if, having been sent ashore on the ship's business, he then fall sick. But if he recover, and may rejoin his ship, but does not, his wages stop from the day when he could have joined her. Of course, if the sickness is caused by the seaman's fault, he is not entitled to any wages while off duty. (2 Pars. Ship. & Adm. 53-'4.)

And if a seaman, on monthly wages, die during the voyage, wages are certainly due to his representative to the *time of his death*. Whether they are not also due to the *end of the voyage* is as yet undetermined. The better opinion seems to be that they *are not*. (2 Pars. Ship. & Adm. 58, and n. 4.)

If the owner had only a *life-estate*, which ended during the year, by his death, no hire was payable at common law to his representatives for the time previous to his death, unless the death occurred on the day when the hire was due. For that time the hire was lost wholly, on the maxim that, in *respect of time, annua nec debitum, judex non separat*. This principle, however, is in Virginia abolished by statute, in pursuance of which the hire was in such case *apportioned*. (V. C. 1873, ch. 136, § 1; V. C. 1887, ch. 129, § 2810.)

3^k. Doctrine as to Liability for *Medical Bills*, in Case of Slaves Hired.

The *owner*, and not the temporary hirer, was *ultimately* liable, although the doctor might assert *his* demand against the person who employed him. (Easley v. Craddock, 4 Rand. 425; Isbell's Adm'r v. Norvell's Ex'or, 4 Grat. 176.)

9ⁱ. What Persons were Slaves in Virginia at the Date of the Abolition of Slavery.

Those who were such on the 1st of July, 1850; such free negroes as became slaves pursuant to law; such slaves as might be lawfully brought into the State; and the descendants of *female slaves*. (V. C. 1860, ch. 103, §§ 1, 2, 3 to 8.)

10ⁱ Propositions from Time to Time for *General Emancipation*.

Mr. Jefferson's plan (1779), Judge St. George Tucker's (1803), and that proposed in the General Assembly in 1831-2, were all founded on the principle of emancipating only those born after a specified time, especially *females* so born, and of removing the free colored population beyond the limits of the United States. (Jeff. Notes on Va. 143; 1 Tuck. Bl., Pt. II., App'x, 76 & seq.; Id. 81. n. *; 4 Jeff. Mem. 388 & seq.)

The difficulties attending any scheme of general emancipation were in the highest degree formidable. They may be summed up thus, viz.: difficulties connected with the *value of the property* concerned, which was at least *one-third* of the entire property of the commonwealth; difficulties arising out of the *aggressive fanaticism* of other sections, which would have been encouraged, by any step in that direction, to increased exertions to disturb the peace, and jeopard the safety of our people; and especially difficulties connected with the apprehended *disastrous results of emancipation* upon the colored population themselves, and through them upon society at large, the successive censuses, particularly from 1840 to 1860, showing a great *physical and moral deterioration* on the part of the *free-blacks*, whether as compared with the *slaves* or with *whites*. (Dew on Slavery, 40 & seq.)

The colony of Liberia was founded by the wise forecast of Virginia statesmen chiefly, as the best medium of ameliorating the condition of things growing out of slavery, and with the hope that it would at the same time diffuse the light of Christian civilization through the dark places of Africa.

11ⁱ. Alarms of Servile Insurrection in Virginia.

Alarms of servile insurrection were rare, confined always within very narrow local limits, and never endured longer than the time required to assemble the neighboring male population. Only two incidents of the kind are of sufficient importance to have found a place even in local history; namely, *Gabriel's* attempt near Richmond, in 1800, which was wholly futile; and *Nat Turner's*, in the county of Southampton, in 1831, which was accompanied by the murder of fifty-five persons, chiefly women and children. These occurrences excited, temporarily, great terror; but in general the intercourse between the races was kindly, and free from suspicion, the rural inhabitants dwelling in undisturbed confidence, frequently in the midst of a colored population numerically greatly superior. And during the late war, the conduct of the colored people was in a high degree praiseworthy, as indeed, in the main, it

has been since. (2 Howis, Va. 391, 439; Dew on Slavery, 99.)

12ⁱ. The Abolition of Slavery in Virginia.

The Constitution of 1864, framed during the war by delegates from a very small portion of the inhabitants of a very few counties, which by its terms took effect from the date of its adoption (7th April, 1864), provided that slavery and involuntary servitude (except for crime), should be abolished and prohibited in the State for ever. (Art. IV., § 19.) Some months after the conclusion of the war, viz.: on the 19th June, 1865, a General Assembly, representing all the counties of Virginia, convened by the proclamation of the governor, chosen in pursuance of that constitution, assembled at Richmond, and tacitly recognizing the governor as chief magistrate, and that constitution as the fundamental law, proceeded to legislate under it. On the 18th December, 1865, the Secretary of State of the United States officially announced that Art. XIII of the Amendments to the Constitution had been ratified by *three-fourths* of the States, thereby making it a part of the constitution; whereby it was ordained that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Whether slavery, therefore, was abolished in Virginia, 7th April, 1864, or when Governor Peirpoint assumed, *de facto*, the administration of affairs; or on the 19th June, 1865, when the legislature assembled, and tacitly recognized the Constitution of 1864; or on the 18th December, 1865, when the XIIIth Amendment was ratified, may be a matter of some question. It is assumed as incontrovertible that President Lincoln's proclamation abolishing slavery in the States then in rebellion, on the 1st day of January, 1863, was operative only in that portion of the country which the armies of the United States had securely occupied, after the proclamation by its terms took effect; and that the abolition of slavery is to be referred either to the action of the State itself, on the 19th of June, 1865 (which seems the more probable date), or to the adoption of the XIIIth Amendment, on the 18th of December, 1865. (McMath v. Johnson, 41 Miss. (Reynolds) Rep. 459-60; Vicksburg & M. R. R. Co. v. Green, 42 Id. 436; Henderlite v. Thurman, 22 Grat. 466; Rives v. Farish, 24 Grat. 130, 134.)

13ⁱ. Measure of Recovery in Controversies touching the Detention or Conversion of Slaves, Detained or Converted, prior to the Abolition of Slavery.

When the possession was *in defendant*, under a *bona*

vide claim of right, at the time of the emancipation of the slaves in this commonwealth, by the Federal or State authorities, it is enacted that the values or damages assessed, should the plaintiff recover, shall be only the value of the services of such slaves, from *the time of tortious conversion or detention, to the period of their emancipation.* (Acts 1866-'7, p. 810, ch. 42.) *Quære* of the validity of this statute, the right of the plaintiff to recover being a *vested right*?

14ⁱ Doctrine as to the Validity and Effect of Bond given for the Purchase-Money or Hires of Slaves, Bought or Hired previous to the Period of Emancipation.

It would seem that there could be no reasonable doubt of the validity of such bonds, notwithstanding the subsequent emancipation, and it has been so decided in North Carolina, and in other States. (Harrell, Adm'r, v. Watson, &c., 63 N. C. Rep. (Phillips), 454; Phillips v. Evans, &c., 38 Mo. Rep. (7 Whittlesey), 305; Wainwright's Adm'r v. Bridges & als. 19 La. An. Rep. 224; Austin v. Sandel, Id. 309; Bradford v. Jenkins, 41 Miss. Rep. (Reynolds), 328; Blewett v. Evans, 42, Id. 804. See Madrazo v. Willes, 3 B. & Ald. 353; Mittelholzer v. Fullarton, 6 Ad. & El. N. S. (51 E. C. L.) 989.)

Thus it is held in Alabama, that an action lies on a promissory note given for the price of slaves, after the date of the President's emancipation-proclamation and the end of the rebellion. (McElwain v. Mudd, 44 Ala. 48.) And it is also held in the same State, that a warranty of title to slaves is not broken by the abolition of slavery. (Fitzpatrick v. Hearne, 44 Ala. 171.) So a bond given for the price of a slave sold in Kentucky in 1823, is recoverable in Illinois, notwithstanding the abolition of slavery there, the contract being valid where and when it was made. (Roundtree v. Baker, 52 Ill. 241; Officer v. Sims, 2 Hick. 501.)

The question is now set at rest by the judgment of the supreme court of the United States in *White v. Hart*, 13 Wal. 646; and *Osborne v. Nicholson & al.*, Id. 654. In the first-named case, it was held, in respect to a promissory note for \$1,230, the purchase-money for a slave, made February 9, 1859, and payable March 1, 1860, that a provision in the Constitution of Georgia of 1868, declaring that "no court or officer shall have, nor shall the General Assembly give jurisdiction to try or give judgment, or enforce any debt, the consideration of which was a slave, or the hire thereof," was void, as *impairing the obligation of contracts*, and that this note was recoverable. (See 13 Wal. 653-'4.) *Boyce v. Tabb*, 18 Wal. 548, recognizes and re-affirms the doctrine laid down in *White v.*

Hart, and Osborne v. Nicholson, *Supra*. And in Virginia it is well settled that such bonds and notes are valid. (Henderlite v. Thurman, 22 Grat. 466; Rives v. Farish, 24 Grat. 128.)

4^h. Slavery in its Relation to the Federal Government.

The words "slave" and "slavery" nowhere occur in the Constitution of the United States (until on the 18th December, 1865, by Amendment XIII., the institution was abolished); but the things *represented* by these words are distinctly alluded to in three passages of the original constitution;

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1ⁱ. The Clause of the Constitution Directing the Apportionment amongst the States of Representatives and Direct Taxes.

They were to be apportioned amongst the States according to population; to be determined by adding to the whole number of *free persons* (including those bound to service for a term of years, and excluding Indians not taxed), three-fifths of *all other persons*. (Art. I., § ii., 3.)

This arrangement, by blending the benefit and the burden, happily adjusted one of the most embarrassing of the many hard problems occurring in the erection of our federal structure. (2 Mad. Pap. 731, 1052 to 1056, 1066 to 1087, 1090 to 1094, 1227, 1233; 3 Do. 1261, 1544; 5 Ell. Deb. 301-305.)

2ⁱ. The Clause of the Constitution Denying to Congress the Power to Prohibit Prior to 1808, the *Importation of such Persons* as any of the States "*now existing*" shall think Proper to Admit. (Art. I., § ix., 1.)

The first draft of the constitution denied such power to Congress altogether, even *forbidding a tax* on persons thus imported (5 Ell. Deb. 379); but on the 21st of August, 1787 (less than a month before the final adjournment of the body), Luther Martin, of Maryland, moved that Congress have power to tax or prohibit the importation of slaves (50 Ell. Deb. 457)—a proposition very warmly sustained by Messrs. Madison, Mason, and Randolph, of Virginia, and vehemently opposed by the delegates from South Carolina and Georgia, who adroitly suggested that it was *the interest* of New England also to oppose it, as they would be the carriers of the commodities produced by slave labor, besides being profitably concerned in importing the slaves. This brought over the New England States in a body, and they, together with Maryland, North Carolina, South Carolina, and Georgia, succeeded in postponing the power of Congress to inhibit the slave trade, in respect to the *existing States*, until 1808, against the protest of Virginia, Delaware,

Pennsylvania, and New Jersey. (3 Mad. Pap. 1388 to 1392, 1427; 2 Rives' Madison, 445 & seq.; 5 Ell. Deb. 457, &c., 471, 477 '8.)

The power committed to Congress was promptly exercised, by statutes making it piracy, and at length a *capital felony*, for any American citizen, or any one whomsoever, being of the crew of an American vessel, to be concerned in the African slave trade. (Rev. Stats. U. S. §§ 5375, 5376; 1 Rob. Pr. (2d ed.) 15 & seq.; Synops. Crim. Law, 21 '2.)

3. The Clause of the Constitution Providing for the Delivery up of Fugitives from *Service or Labor*.

No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due. (Art. IV. § iii. 3.)

This provision was not proposed in convention until 28th August, 1787, and was then adopted *nem. con.* (3 Mad. Pap. 1447, 1556; 5 Ell. Deb. 492.)

The first act of Congress to give effect to it was that of Feb. 1793. (1 Bright. Dig. 294.) It failed of efficiency because it committed its administration to *State officials*, who, in some of the States, were finally prohibited by the State laws from acting. Indeed, Virginia had been amongst the first to declare that it was not competent to Congress to devolve the execution of Federal laws upon State officers. (Feely's Case, 1 Va. Cas. 321; Jackson v. Rose, 2 Va. Cas. 34; Poole's Case, Id. 276.) Several of the States, however, proceeded to oppose *positive obstructions* to reclamations by masters of their fugitive slaves, which were emphatically condemned as unconstitutional by the supreme court of the United States, in *Prigg v. Penn'a*, 16 Pet. 539. See also *Wright v. Deacon*, 5 Serg. & R. 63; *Com'th v. Griffith*, 2 Pick. 19; *Jack v. Martin*, 12 Wend. 316; *S. C.* 14 Wend. 507; 1 Rob. Pr. (2d ed.) 32 & seq.)

The last and more effective statute was that of September, 1850, whereby the duty of aiding in the recovery of fugitive slaves was devolved exclusively on *Federal functionaries*. (1 Bright. Dig. 295; *Prigg v. Penn'a*, 16 Pet. 539; *Jones v. Van Zandt*, 5 How. 229; *Moore v. Illinois*, 14 How. 18.)

- 3^g. Slavery in its Relations to the World.

The discussion of slavery in its relations to the world will oblige us to advert to, (1), The African slave-trade; (2), The effect of a slave's going to another country where slavery does not exist, supposing him to return; (3), Liability for

seizing or harboring a slave, or for his price where slavery is lawful, the action being brought where slavery is unlawful; (4), Liability of a master to pay wages to a slave who continues to serve him without a contract, in a country where slavery is not lawful; and (5), The effect of a contract to render perpetual service;

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1^b. The African Slave-Trade; W. C.

1ⁱ The Origin of the African Slave-Trade.

The Spaniards and Portuguese, in the course of their African discoveries, were the first to institute the traffic in slaves, and they made great profit thereby. The English followed the example. Sir John Hawkins made several voyages, commencing in 1562, for the purpose of seizing negroes in Africa, and selling them in the West Indies; and in 1585 a company for carrying on the traffic was incorporated by letters patent of Queen Elizabeth. Thenceforward great encouragement was given to it by royal charters, treaties, and acts of parliament. It was not until 1806 (Stat. 46 Geo. III.), that Great Britain declared it unlawful (almost *thirty years* after Virginia had set the example), and even to this day the English and American courts have been obliged to allow, atrociously wicked as the traffic is, that although contrary to the *law of nature*, the slave-trade is not contrary to the *law of nations*. (Madrazo v. Willis, 3 B. & Ald. 353; The St. Louis, 2 Dods. R. 210; The Antelope, 10 Wheat. 115; 1 Rob. Pr. (2d ed.) 15, 16, 19, 20.)

2ⁱ. The Present *Status* of the African Slave-Trade.

By the United States it is made, as has been seen, a *capital felony* in persons subject to their jurisdiction; by Great Britain it is made a *felony*; and it has been declared unlawful by most, if not all, of the civilized governments of the world. (1 Rob. Pr. (2d edit.) 20.)

By means of the English colony of Sierra Leone, and the American colony (now an independent government) of Liberia, aided by the presence and vigilance of British and American squadrons on the coast, in pursuance of the treaty of Washington of 1842, the traffic has been for some years effectually suppressed on the western coast of Africa from the mouth of the Senegal, near the southern border of the great desert, quite to the equator, a distance of twenty-five hundred miles, and greatly circumscribed in extent and virulence on the whole of that coast. Indeed, it is now confined practically to the Soudan and to the eastern coast, where, in the Portuguese settlements at Zanzibar, and near the mouth of the Zambezi, it still prevails, with the accustomed concomitants of diabolical wickedness and cruelty. (Wilson's W. Africa, 242, 306, 332, 349,

- 435; Foote's Afr. & Am. Flag, 357, 384; Livingst. Zambesi, 6 to 8, 475, 481, &c., 620, &c.)
- 2^b. Effect of a Slave's going to Another Country where Slavery does not Exist, supposing him to Return; w. c.
- 1^d. Where the Slave is Carried thither by his Master, or goes *with his Master's Consent*; w. c.
- 1^k. Effect where the Slave goes, or is Carried (by his Master's Consent), to *Reside*.

The slave's *status* as a *freeman* is thereby established permanently, and is not changed by a subsequent return to a slave domicile. (Griffith v. Fanny, Gilman, 143; Hunter v. Fulcher, 1 Leigh, 181; Betty, &c. v. Horton, 5 Leigh, 615; Davis v. Tingle, 8 B. Monr. 545; Mercer v. Gilman, 11 B. Monr. 211.)

- 2^k. Effect where the Slave is Carried by his Master into the the Non-slaveholding Country, *with the Purpose and Intent* of thereby emancipating him.

The slave's *status* as a *freeman* is thereby established, and his subsequent return to a slave domicile does not change it. (Foster's Adm'r v. Foster, 10 Grat. 492.)

- 3^k. Effect where the Slave is Carried thither, or goes, by his Master's Consent, for the Purpose of *Temporary Sojourn*.

As the law of the non-slaveholding country recognizes no authority in the master, it will of course allow none to be enforced, and the slave, by writ of *habeas corpus* (where that writ prevails), may be released from any restraint on the part of the master. (Somerset's Case, 20 How. St. Tri. 1; S. C. Lofft's R. 1, 17; Smith v. Brown & Cooper, 2 Salk. 666.)

But the *common law* does not cancel or annul the relation of slavery. It simply does not acknowledge it. Hence, if the slave be afterwards found within the slave domicile, the master's rights having never been impaired, may be there enforced. This doctrine is acknowledged by *Lord Stowell* (Slave Grace, 2 Hagg. Adm. R. 94); by the Supreme Court of *Massachusetts* (Commonwealth v. Aves, 18 Pick. 218); by the Supreme Court of *Kentucky* (Graham v. Strader, 5 B. Monr. 176; Collins v. America, 9 B. Monr. 585; Mercer v. Gilman, 11 B. Monr. 210; Maria v. Kirby, 12 B. Monr. 542); by the Supreme Court of *Maryland* (Joice's case, 4 Har. & McH. 295, &c.); by the Supreme Court of *Virginia* (Lewis v. Fullerton, 1 Rand. 21); and by most of the judges of the *Supreme Court of the United States* (Dred Scott v. Sandford, 19 How. 452, 459, 466 '7, 483, 485 '6, 494, 499, 550, 558, 591; Stor. Conf. Laws, § 96).

If the law of the non-slaveholding country *expressly dissolves* the relation of master and slave, and *declares*

the slave to be free, or where, by *competent proceedings* whilst in the country, the slave is adjudged to be free, a different conclusion must probably be admitted. Thus where Louisiana slaves were carried to *France* (whose law expressly declares all slaves on French soil to be free), and afterwards returned to Louisiana, they were adjudged *to be free there*. (*Maria Louise v. Maret*, 9 Louisiana R. 473; *Smith v. Smith*, 13 Louis. 441; *Thomas v. Genevieve*, 16 Louis. 483. See also *Betty, &c. v. Horton*, 5 Leigh, 623.)

- 2^d. Effect where the Slave Escapes into the Non-slaveholding Country, *without the Master's Consent*.

Slavery being the result of positive local law, it can exist only where it is by law established; and if a slave escapes or is carried beyond the slave-territory, if his master can reclaim him, it is only by virtue of some express stipulation, or as a matter of international comity. (*Grot. de Jure*, &c. L. II., c. XV., 5, 1; *Id.* LX., c. X., 2, 1; *The Antelope*, 10 Wheat. 120; *Commonwealth v. Aves*, 18 Pick. 218; *Forbes v. Cochrane*, 2 B. & Cr. (9 E. C. L.) 440; *Prigg v. Pennsylvania*, 16 Pet. 594.)

- 3^d. Liability for Seizing or Harboring a Slave, or for his Price where Slavery is Lawful, the Action being brought where Slavery is *Unlawful*.

The action is maintainable for the injury, or the price, if the injury or the sale took place in a country where slavery is allowed by law. (*Smith v. Brown, &c.* 2 Salk. 666; *Madrazo v. Willes*, 3 B. & Ald. 353.) But see *Forbes v. Cochrane*, 2 B. & Cr. (9 E. C. L.) 448; *Mittleholzer v. Fullarton*, 6 Ad. & El. (N. S.) (51 E. C. L.) 989; *Ante*, p. 193.)

- 4^d. Liability of a Master to pay Wages to a Slave, who continues to serve him, *without a Contract*, in a Country where Slavery is not Lawful.

No wages are recoverable, there being no *actual* contract, and no ground on which to *imply* one. (*Alfred v. Fitz James*, 3 Esp. 3; *Ante*, p. 189, 7¹.)

- 5^d. Effect of Contract to render *Perpetual Service*.

The law does not prohibit such a contract, which creates a *status* very distinguishable from slavery. It is indeed, in principle, no more than making *for life* such a contract as every apprentice makes *for a term of years*. But such a contract, for its improvidence, cannot but suggest a suspicion of fraud, or oppression, which it would be requisite to remove by showing it to be fair. It is said it must be *by deed*, although it is not perceived why; and at all events no adequate remedy exists practically to enforce such an engagement. There is no means to compel its observance *specifically*, (as there is in case of an *apprentice*, and

formerly was in case of an *indentured servant*,) and the damages given by a jury for its breach would probably be merely nominal. (1 Bl. Com. 424-5; 2 Chit. Cont. (11 Am. ed.) 839; Wallis v. Day, 2 Mees. & W. 281; 15 Vin. Abr. Master, &c. (N.) 5; Canada v. Canada, 6 Cush. (Mass.) 15; Clark's Case (1 Blackf. (Ind.) 12 Am. Dec. 213.)

It may also be observed, that when the acts stipulated for require special knowledge, skill, ability, or the exercise of judgment, discretion, integrity, and the like personal qualities, on the part of the employees; in short, where the full performance, according to the spirit of the agreement, rests in the individual will of the contracting party, courts of equity cannot directly compel specific execution, but they may sometimes indirectly and negatively enforce its performance by enjoining its breach. Thus, if an actor contracts to perform at the plaintiff's theatre, and *nowhere else*, for a specified period, equity, whilst it will not undertake to compel the actor to comply with his contract to act at the plaintiff's theatre, will yet grant an injunction to prevent his performing at other theatres or places of amusement. (Clark's Case, 12 Am. Dec. 216. *Note*, and cases there cited.)

4^e. Who shall be deemed *a Negro or Colored Person* in Virginia.

Every person having *one-fourth or more* of negro blood shall be deemed a colored person. (V. C. 1873, ch. 103, § 2; V. C. 1887, ch. 6, § 49.)

2^e. Menial Servants; w. c.

1st. Why they are so called.

Because they are *domestics*, employed *intra mœnia*—that is, within the walls of the house. (1 Bl. Com. 425.)

2^d. What Servants are *Menials*.

A head-gardener is a menial servant, notwithstanding he is lodged in an out-house, so *a fortiori* is a groom; but not a governess, nor a clerk. (Nowlan v. Ablett, 2 Cr. Mees. & Ros. 54; Todd v. Kerrieh, 8 Exch. 151; Berston v. Collyer, 4 Bingh. (13 E. C. L.) 309.)

3^d. Apprentices.

The doctrine touching apprentices may be presented under the following heads: (1), Who are apprentices; (2), The mode of binding apprentices; (3), The obligation of master, apprentice, and parent or guardian, respectively; (4), The authority of a master over an apprentice; (5), The assignment by a master of the indentures of apprenticeship; (6), The adjustment of controversies between master and apprentice; (7), The punishment for harboring an apprentice, and for his desertion; and (8), The dissolution of the contract of apprenticeship;

w. c.

1^c. Who are Apprentices.

Apprentices (so called from *apprendre*, to learn), are servants who are bound for a term of years to serve their masters, by whom they are to be *maintained and instructed* in some trade or calling. Every contract for teaching or learning a trade is *prima facie* an apprenticeship, and so it is an apprenticeship where the substantial object is *to learn*, and not merely *to serve*. (1 Bl. Com. 426; Rex v. Closeworth, 6 Ad. & El (33 E. C. L.) 236; Rex v. Combe, 8 B. & Cr. (15 E. C. L.) 82; Rex v. Edingale, 10 B. & Cr. (21 E. C. L.) 739).

2^c. The Mode of Binding Apprentices.

Let us note, (1), The instrument of the contract; (2), The proper parties to the contract; (3), The terms of the contract of apprenticeship;

W. C.

1^b. The Instrument of the Contract of Apprenticeship.

It must always be *in writing*, and according to the better opinion, must at common law be *by deed*, although, if the deed be lost, *its contents*, as in all other cases, may be proved. It is the only *executory* contract which the common law did not permit to be *by parol*, bills of exchange being no exception to this proposition, because they were not *originally* known to the common law, but were adopted into it, from the custom and usage of merchants. (Castor & Aicles' Case, 1 Salk. 68; Bac. Abr. Master, &c. (A.) 1; 1 Pars. Con's 533.)

In Virginia, however, it seems that the contract may, by statute, be in writing only, *without seal*. (V. C. 1873, ch. 122, §§ 5, 7; V. C. 1887, ch. 115, § 2585.)

2^b. The Proper parties to the Contract of Apprenticeship;

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1ⁱ. Doctrine at Common Law as to the Proper Parties.

It seems not inadmissible that an adult should bind himself apprentice, but generally the person bound is *an infant*, and in Virginia the *Statute* (V. C. 1873, ch. 122, § 1 & seq.; V. C. 1887, ch. 115, §§ 2581 & seq.) contemplates none others as such. Whether the person bound be infant or adult, he himself is, at common law, an indispensable party to the engagement, and his consent is usually signified by his signing the contract (*indenture*, as it is called*). The father has no right to bind the child without his consent, and indentures executed by the father, without the child's concurrence, are not only voidable, but void. So the party contracting to teach must be *capable to contract*, and therefore a married woman cannot

* NOTE.—An *indenture* is a writing *under seal, inter partes*, wherein the parties *mutually stipulate*, in contradistinction to a *deed poll*, in which only *one party* stipulates, or promises. (2 Bl. Com. 295; 2 Min. Insts. 588-9.)

be such party. (Bac. Abr. Master, &c. (A.) 1; Id. (B.) 1; Rex v. Closeworth, 6 Ad. & El. (33 E. C. L.) 236; Pierce v. Massenburg, 4 Leigh, 493; King v. Armesby, 3 B. & Ald. (5 E. C. L.) 584; Rex v. Guilford, 2 Chit. (18 E. C. L.) 284.)

On the other hand, it seems regarded as necessary, (as it is certainly *usual*,) that some friend, father, guardian, &c., should be bound along with the infant for the faithful observance of the indentures by him. (Bac. Abr. Master, &c. (A.) 1; Id. (B.) 1.)

2ⁱ. Doctrine by Statute in Virginia, as to Proper Parties; W. C.

1^k. Doctrine by Statute in Virginia as to Proper Parties *Generally*.

The statute contemplates that the person bound shall be a *minor*; that the binding may be by the father or guardian, or, if there be neither, by the mother; that it shall be by consent, *in writing*, of the minor himself, if of the age of fourteen, and if under that age, by consent entered of record, *of the court* of the county or corporation in which he resides; and that it shall be *in writing*, and filed within six months from the date, in the clerk's office of the court of the county or corporation where it was executed. (V. C. 1873, ch. 122, §§ 1, 5, 7; V. C. 1887, ch. 115, §§ 2581, 2585, 2587.)

The statute further provides that, by the same authority, and under like limitations, a *minor* may be placed in any *incorporated asylum* for destitute children, which will then be entitled to the minor's custody, or to bind him apprentice. (V. C. 1873, ch. 122, § 2; V. C. 1887, ch. 115, § 2582.)

2^k. Doctrine by Statute in Virginia, as to Proper Parties in the *Binding of Poor Children*.

Any minor "*found begging in a county or corporation, or likely to become chargeable thereto*," may by *any overseer* of the poor, by an *order of court first had*, be placed in such incorporated institution as above-named, or be bound apprentice, if a boy, until twenty-one, and if a girl, until eighteen (filing the indentures as above-named, *supra* 1^k). In no case need the minor himself be a party to the binding (it being a *matter of police*); but the covenants ought to be *with him* as well as with the overseer, and such is the usual and proper form of the indentures. (Hen. Just. 68; 4 Min. Insts. 1321 '2.) But even if the covenants were *with the overseer only*, if the binding were in pursuance of the statute, the suit on the indentures should be *by the apprentice*, and not by the overseer (Wilton v. Poindexter, 3 Munf. 183; Brewer v. Harris, 5 Grat. 285, 292, 293); but if the binding were not in ac-

cordance with the statute, the suit *at common law* must be in the name of the overseer, for the benefit of the minor (Bullock v. Sebrell, 6 Leigh, 560), although *by statute* with us (V. C. 1873, ch. 112, § 2; V. C. 1887, ch. 107, § 2415), it may be in the *minor's own name*. (V. C. 1873, ch. 122, §§ 3, 4, 5, 7; V. C. 1887, ch. 115, §§ 2583, 2584, 2585, 2591; Bac. Abr. Master, &c. (B.) 1; Rex v. St. Nicholas, 2 T. R. 729; Carr v. Jones, 3 Serg. & R. 158.)

3^h. The Terms of the Contract of Apprenticeship; w. c.

1ⁱ. Terms of the Contract at *Common Law*; w. c.

1^k. Terms on the *Part of the Apprentice*.

Faithfully to serve the master in all such lawful business as he shall be put to by him, and to behave himself honestly and obediently towards the master, and honestly and orderly towards his family. (Hen. Just. 69; Grayd. Forms, 304; 4 Min. Insts. 1321-'2.)

2^k. Terms on the *Master's Part*.

That he covenants *with the apprentice* to instruct him in the art, trade or mystery agreed on; to allow him sufficient meat, drink, apparel, &c., during the term of apprenticeship; and to do whatever else is agreed on. (Hen. Just. 69; Grayd. Forms, 304; 4 Min. Insts. 1321-'2.)

2ⁱ. Terms of the Contract of Apprenticeship in Virginia, *by Statute*; w. c.

1^k. Terms where the Apprentice is Bound by the *Parent or Guardian*, without an Order of Court.

The age of the minor shall be specified, and what art, trade, or business he is to be taught; and the master shall be bound to teach the same, whether expressly provided in the writing or not, and also to teach him reading, writing and common arithmetic, including the rule of three. (V. C. 1873, ch. 122, § 5; V. C. 1887, ch. 115, § 2585; 4 Min. Insts. 1321.)

2^k. Terms where the Child is Bound by *Order of Court*.

The same as in the preceding case (1^k), *and also* a stipulation by the master to pay what the court shall direct (if anything) for the *apprentice's services*, to the father or mother, or part to each, annually, or to the apprentice at the end of the term, with interest; but the last year's payment shall go to the apprentice always. The payment of these sums is to be secured by bond, if the court shall so order, recoverable in a summary way. And such direction may be changed from time to time by order of the court, on motion by the overseer of the poor, by the father or mother, or by the apprentice, on proof of notice to the adverse party. (V. C. 1873, ch. 122, §§ 6, 7, 9 to 11; V. C. 1887, ch. 115, §§ 2586, 2589 to 2591; 4 Min. Insts. 1322.)

In both these cases (2^b & 1^b), the terms of the contract, *at common law*, must be observed.

3^c. Obligation of Master, of Apprentice, and of Parent, etc., respectively, together with the Rights of the Master ;

w. c.

1^b. Obligation of *Master* ; w. c.

1ⁱ. Maintenance.

The master being entitled to all the apprentice's earnings, is bound, independently of express stipulations, to supply him with *necessaries*, including medicines, medical attendance, and nursing ; and whilst the master's death, during the term, terminates the obligation *to teach* (which is merely *personal*), the obligation of maintenance, etc., continues unimpaired. (*Easley v. Craddock*, 4 Rand. 425 ; *Reg. v. Smith*, 8 Car. & P. 334 E. C. L. 153 ; *Bac. Abr. Master, &c. (G.)*.)

2ⁱ. Instruction in the Trade, etc.

The trade, or business, may be any whatsoever, *e. g.*, that of a chimney-sweep, a housewife, a sailor, a farmer, a mechanic, an attorney, and even, it is said, a *clergyman* ; and whatever the trade or business is, the master is bound to give instruction in it, and is not discharged by the apprentice's feeble health, or his inaptitude to learn, or his inability to render service, without his default. (*Bac. Abr. Master, &c. (A.)* 2 ; *Id. (C.)* ; 1 Pars. Con. 533.)

3ⁱ. Education.

It does not appear that the common law obliged a master to educate an apprentice, any more than a parent a child ; but by statute in Virginia, it is made his duty, as stated above, to teach him reading, writing, and arithmetic, whether it is so provided in the writing of apprenticeship or not. (V. C. 1873, ch. 122, § 5 ; V. C. 1887, ch. 115, § 2585.)

2^b. Obligation of *Apprentice*.

To serve faithfully during the term, and to behave respectfully and orderly to the master's family, and generally to fulfill his engagements, as set forth in the indentures. (*Ante*, p. 202, 1^k.)

It seems that, at common law, no action lies against an *infant*, on the covenants contained in the indentures, or at least that his infancy is pleadable as a defence thereto. (*Gylbert v. Fletcher*, 4 Cro. (Car.) 179 ; *Lilly's Case*, 7 Mod. 15 ; *Bac. Abr. Master, &c. (B.)* ; 1 Pars. Con. 533 ; 1 Th. Co. Lit. 177, n. (40) ; 1 Chit. Pl. 132 ; 1 Chit. Cont. (11 Am. ed.) 199.)

But the contrary doctrine (inasmuch as it is "for his good teaching whereby he may profit himself afterwards") seems well-nigh irresistibly conveyed by 1 Th. Co. Lit. 175 ; *Keane v. Boycott*, 2 H. Bl. 512 ; *Rex v. Mountsorrel*,

3 M. & S. 497; *Rex v. Bow*, 4 M. & S. 383; *Rex v. Wigston*, 3 B. & Cr. (10 E. C. L.) 484; *King v. Arundel*, 5 M. & S. 259; *Bac. Abr. Infancy, &c. (I.)*; 1 Tuck. Com. 78, B. I.

Perhaps it is meant that the action is maintainable *upon the contract* of apprenticeship, such as the *law might raise* from the facts, but not *upon the indentures*; or possibly, that although *no action* can be made good against the infant, he may, notwithstanding, be *chastised by the master*, and be constrained under the statute touching the subject (V. C. 1873, ch. 122, § 12; V. C. 1887, ch. 115, § 2592) to serve in pursuance of the agreement. (1 Burns' Just. 144.)

To the writer it would appear most consonant to the analogies of the law relating to infants' contracts, to hold that the infancy is no valid plea at common law to an action upon the indentures. And in Virginia it is expressly declared by statute, that an apprentice, notwithstanding his infancy, shall be *liable to the master* for deserting his service. (V. C. 1873, ch. 122, § 15; V. C. 1887, ch. 115, § 2595.) But independently of this statutory provision, the doctrine best sustained by *authority* is supposed to be that no action lies against the infant apprentice upon the covenants contained in the indenture of apprenticeship.

3^h. Obligation of *Parent*.

The parent or next friend who undertakes for the infant apprentice is liable to the master, in pursuance of his contract, for the infant's violation of any of the stipulations; but no further than his covenants extend. (*Branch v. Erington*, 2 Dougl. 518; *Cuming v. Hill*, 3 B. & Ald. (5 E. C. L.) 59; 1 Pars. Con. 534-'5.)

4^h. The Rights of a Master in Respect to the Apprentice.

The master has a right to the *custody* of the apprentice's person, and to *all his earnings* of every description, and to the value of his services, whether rendered with the master's consent or against it, and whether there was or was not an express contract with the apprentice or the master. (*Barber v. Dennis*, 1 Salk. 68; *Eades v. Vandeput*, 4 Dougl. (26 E. C. L.) 1; *Foster v. Stewart*, 3 M. & S. 191, 200; 1 Bl. Com. 429, n. (20).)

4^g. The Authority of the Master over an Apprentice; w. c.

1^h. The General Authority of Master.

He may lawfully correct his apprentice for negligence, disobedience, or other improper conduct, so it be done in moderation, but he cannot delegate his authority herein to another. (*Bac. Abr. Master, &c. (B.)* 2; *Id. (N.)*; *Combe's Case*, 9 Co. 76 a, & n. (D.); 1 Tuck. Com. 77, B. 1.)

He may also, at common law, order him, *within the commonwealth*, whithersoever he will, and may even send him out of the commonwealth, if it be so agreed by the contract

of apprenticeship, or if the nature of the service for which he is bound imports it, as in case of a sailor's apprentice. (Coventry v. Woodhall, Hob. 134 a; 1 Burns' Just. 219; 1 Tuck. Com. 78, B. I.)

2^b. The Authority of Master to Remove Apprentice out of the Commonwealth; w. c.

1ⁱ. The Doctrine at Common Law.

He cannot do it except as just stated. *Supra*, 19; and if, notwithstanding, he do remove him, it *determines the relation*, and liberates the apprentice. (Coventry v. Woodhall, Hob. 134 a; Commonwealth v. Edwards, 6 Binn. 202; Randall v. Rotch, 12 Pick. 107; Bac. Abr. Master, &c. (E.); 1 Tuck. Com. 78, B. I.)

2ⁱ. The Doctrine *by Statute* in Virginia.

No apprentice shall *reside* out of the county or corporation wherein the writing of apprenticeship is required to be filed, without leave of the court thereof; and if leave be given, a copy of the writing is to be filed in the new county or corporation, whose court has thenceforward cognizance of the apprenticeship. And if, without such leave, an infant apprentice be removed to another county or corporation, and remain *more than one month*, his apprenticeship is at an end. (V. C. 1873, ch. 122, § 13; V. C. 1887, ch. 115, § 2593.)

5^e. Assignment by Master of Indentures of Apprenticeship; w. c.

1^b. Doctrine at Common Law.

Apprenticeship implies a high *personal trust and confidence*, and it is not a matter of indifference to whom it is committed. Hence, *at common law*, the master *cannot legally assign the indentures*, nor do they pass even to his executors, etc. His assignment, if he makes one, passes no interest in the apprentice, but is viewed only as a contract between the assignor and assignee, that the latter shall receive the profits arising from the apprentice's services, just as the assignment of a bond is regarded as a promise that the assignee shall receive the amount. (Baxter v. Bentfield, 2 Str. 1266; Rex v. East Bridgeford, 2 Str. 115; Caistor & Eccles, 1 Ld. Raym. 683; King v. Storkland, 1 Dougl. 71; 1 Burns' Just. 147; 2 Kent's Com. 265; Bac. Abr. Master, &c. (G).)

2^b. Doctrine *by Statute* in Virginia.

The writing of apprenticeship, with the *approval of the court* of the county or the corporation where the same is required to be filed, and on such terms as it may prescribe, *may be transferred* by the master, or within three months after his death, by his *personal representative*, the assignee succeeding to the master's rights and obligations for the future. (V. C. 1873, ch. 122, § 8; V. C. 1887, ch. 115, § 2588.)

6^g. Adjustment of Controversies between Master and Apprentice; w. c.

1^h. Summary Adjustment; w. c.

1ⁱ. Tribunal Charged with the Power of Adjustment.

The court of the county or corporation where the writing of apprenticeship is required to be filed, may hear the mutual complaints of the parties and determine them in a summary way, making such order as the case may require. (V. C. 1873, ch. 122, § 12; V. C. 1887, ch. 115, § 2594.)

2ⁱ. Mode of Proceeding in the County or Corporation Court.

The complaint may be on the part of the *master*, for the apprentice's desertion or other misconduct; and on the part of the *apprentice*, for undeserved or excessive correction, want of instruction, insufficient allowance of food, raiment, or lodging, or non-payment of what was directed to be paid. And after notice to the party complained of, the court may determine the same in a summary way, making such order as the case may require. (V. C. 1873, ch. 122, § 12; V. C. 1887, ch. 115 §§ 2593, 2594; Bac. Abr. Master, &c. (C.); 1 Tuck. Com. B. I.)

2^h. Adjustment by Action, or Suit.

Either party may sue on the contract of apprenticeship. In general, the suit in behalf of the apprentice ought to be *in his own name*, and therefore the covenants ought to be *with him*. But in Virginia he may maintain the action if the covenants are *for his benefit*, although they are *not with him*. (*Ante*, p. 201, 2^k; 1 Tuck. Com. 78, B. I.)

7^g. Punishment for Harboring Apprentice, and also for his Desertion; w. c.

1^h. Punishment of Apprentice for Desertion.

He is liable to his master, *notwithstanding his infancy*, for all damages sustained by such desertion. (V. C. 1873, ch. 122, § 15; V. C. 1887, ch. 115 § 2595.)

2^h. Punishment for Enticing away, Concealing or Harboring an Apprentice.

To *entice*, or, without the consent of the master, to *take or carry away* an apprentice *knowingly* (of which the possession of him, or permitting him to remain on one's premises, *knowing him to be an apprentice*, is conclusive evidence), subjects the offender to a fine of twenty dollars; and *knowingly to employ, conceal, or harbor* any such apprentice, is punishable by a fine of three dollars per day to the master, in addition to the damage sustained by him, whilst the court or justice rendering judgment for such offence may require of the offender a recognizance to keep the peace, and *be of good behavior*. (V. C. 1873, ch. 122, § 16; V. C. 1887, ch. 115 § 2596.)

8^g. Dissolution of the Contract of Apprenticeship; w. c.

1^h. Dissolution by Consent of *all the Parties Concerned*.

This, in case of parish-apprentices, includes the overseers of the poor, and in other cases the parent (or guardian), master, and infant himself; and if the binding were *by deed*, the dissolution must be *by deed also*. (1 Burns' Just. 148; Bac. Abr. Master, &c. (G.) 2; Castor, &c. Case, 1 Salk. 68; Rex v. Bow, 4 M. & S. 386.)

2^h. Dissolution *by Master*, in Consequence of Apprentice's *gross Misconduct*.

As if he deserts the master's service, and *stays long away*, or contracts new and incompatible engagements; but not if he withdraws *only for a short time*, declaring that he never intends to return, but *does return*, and ask to be received. The contract is more than a *contract of service*, and the master owes it to the young person entrusted to him to bear long with him, as a parent would; and the master's relations and duties cannot be discontinued in consequence of any *ordinary misbehavior* whilst the apprentice continues with him. (Winstone v. Linn, 1 B. & Cr. (8 E. C. L.) 460; Wise v. Wilson, 1 Car. & Kir. (47 E. C. L.) 662.)

3^h. Dissolution *by Apprentice*, in Consequence of the *Master's Default*.

e. g., For cruel and inhuman treatment, omission to furnish necessities, &c. (Bac. Abr. Master, &c. (C.); McGrath v. Herndon, 2 Monr. (Ky.) 82; Same v. Same, 4 Monr. 481.)

4^h. Discharge *by Court of County or Corporation*.

For such cause or complaint on either side as satisfies the court that the relation can no longer redound to the good of either; *e. g.*, for habitual drunkenness, habitual neglect, lewd association, &c., working on Sundays, natural idiocy, insanity, &c., but not because the apprentice is lame, or incurably sick, or because he marries without the master's privity. (Bac. Abr. Master, &c. (C.); Hawkesworth v. Hillary, 1 Saund. 313, 314, & *notes*; V. C. 1873, ch. 122, § 12; V. C. 1887, ch. 115, § 2594.)

When the court orders a discharge, it may order also a restitution of a due proportion of the premium, even though the discharge be granted for the misconduct of the apprentice. (Hawkesworth v. Hillary, 1 Saund. 313, n. (3); Bac. Abr. Master, &c. (C).)

4ⁱ. Laborers.

These are persons who are only hired by the day, week, or month, &c., and do not live *intra mœnia*, like domestics. (1 Bl. Com. 427.)

No public authority in Virginia is empowered to adjust the wages to be paid to laborers; but by statute all persons who, not having wherewith to maintain themselves and their families, live idly, and refuse to work for the *usual and common wages* paid to other laborers in the like work, are

deemed *vagrants*, and are treated accordingly. (*Ante*, p. 147, 2^m; V. C. 1873, ch. 51, § 19; V. C. 1887, ch. 38, § 884.)

5^f. Stewards, Factors, Bailiffs, Agents, &c.

These are species of servants, although in a superior ministerial capacity. (1 Bl. Com. 427; 2 Kent's Com. 622; 1 Pars. Cont. 78 & seq.)

3^e. The manner in which the Relation of Service affects Master and Servant respectively.

In order to set forth the manner in which the relation of service affects master and servant respectively, it will be necessary to advert to, (1), The fact that the relation of master and servant depends *on contract*, express or implied; (2), The peculiar privileges of an apprentice in England; (3), The doctrine touching the homicide of masters by servants; (4), The obligation of the master touching testimonials to the servant's character; (5), The doctrine touching the liability of the servant to his master; (6), The doctrine touching the servant's dealing for his own benefit with the subject of the agency;

W. C.

1^f. The relation of Master and Servant Depends *on Contract*.

The contract may be *express or implied*, and in general, is governed by the same rules as other contracts. Hence, if it is not to be performed within a year, it must by the statute of *parol agreements* (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840 (cl. 7).) be in writing, and signed by the party to be charged. So the engagement must be *mutual*, on the one part to serve, and on the other to employ or pay, although these engagements are not necessarily measured in duration, the one by the other. The servant may be bound to serve for a longer time than the master is bound to employ, and *vice versa*. So service *voluntarily* accepted implies in general, a promise to pay for it, unless such promise can be repelled by showing some *sufficient reason* for the service, other than the expectation of wages, *e. g.*, when the service is rendered to a *near relation*, to whom it is due as a debt of affection, or in *anticipation of an unpromised legacy*, or in case of one claimed *colorably* as a slave. (Pars. Cont. 529 to 531; Williams v. Stonestreet, 3 Rand. 559; Alfred v. Fitz James, 3 Esp. 3; *Ante*, p. 189, 7¹.)

The relation of master and servant, depending, as it does, on contract, will oblige us to observe, (1), The mode of entering into a contract of service; (2), The effect of a contract of hiring for an *indefinite time*; (3), The effect of an *entire* contract of service; (4), The effect upon wages of the sickness of the servant; (5), The dissolution of a contract of service; (6), The effect on a contract of service of the marriage of a female servant; (7), The authority of a master over his servant; and (8), The obligation of the master in respect to the servant;

W. C.

1st. Mode of Entering into the Contract of Service.

At common law, the contract might, in all cases, have been *by parol*, except in case of an apprentice, but by the statute of parol agreements in Virginia (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840), it is required to be in writing, when *not to be performed within a year*.

2nd. Effect of Contract of Hiring for an *Indefinite Time*: w. c.1st. General Doctrine.

A *general hiring*, that is, a hiring without fixing the duration of the service, is *presumed* to be a hiring *for a year*, one revolution of the seasons, the presumption being, of course, liable to be changed by proof, as for example, that the wages are *payable* (not merely *estimated*) by the week or by the month. (1 Bl. Com. 425; 1 Pars. Cont. 518, n. (h); 2 Chit. Cont. (11 Am. ed.) 841; Huttman v. Boulnois, 2 Carr. & P. (12 E. C. L.) 510; Turner v. Robinson, 5 B. & Ad. (27 E. C. L.) 789; Fawcett v. Cash, Id. 904; Baxter v. Nurse, 6 M. & G. (46 E. C. L.) 937.)

2nd. Qualified Doctrine in Case of *Menial Servants*.

A general hiring of a *menial servant* is also presumed, *prima facie*, to be for a year, but subject to an *implied* condition that the engagement may be determined on either side by a *month's notice*, or by paying or forfeiting a *month's wages*. But the presumption and the implication may both be repelled by contrary proof. (1 Bl. Com. 425, n. (5); 1 Pars. Cont. 518, and n. (h); 2 Chit. Cont. (11 Am. ed.) 839-40; Turner v. Mason, 14 M. & W. 116; Fawcett v. Cash, 5 B. & Ad. (27 E. C. L.) 904.)

3rd. Effect of an *Entire Contract* for Service.

That is, a contract to serve for a *specific time*, or until some *specified result* is accomplished. (1 Bl. Com. 425; n's (5)†; 1 Pars. Cont. 519 & seq., and n's (i) & (j).)

w. c.

1st. The Original Doctrine of the Common Law.

The original doctrine is that a contract *entire* in point of *time* or *otherwise*, must be completely performed (unless the performance be prevented by the act or default of the employer, or by act of providence), before any right to compensation accrues, and that notwithstanding the wages be *estimated* by the month, week, etc., supposing them not to be expressly *payable* monthly, etc. And on the other hand, the doctrine is that the employer is bound to pay for the *entire time*, etc., although he may have dismissed the servant before the expiration of the period, unless he dismissed him for *sufficient cause*; and that the employer cannot reduce the recovery upon a contract by showing a *partial failure* of consideration, or *partial failure* to fulfil the contract, although a *total failure*, in either particular, was always available, if the contract were not *under seal*.

(1 Pars. Cont. 520 & seq., n's (j), (l) and (n); Temple v. McLachlan, 2 Bos. & Pul. (N. R.) 136; Farnsworth v. Garrard, 1 Campb. 38; Withers v. Green, 9 How. 227-'8.)

2^h. The Modern Doctrine.

The same as that originally prevailing, except only in the *last particular*. The employer, when the contract is *not under seal*, may reduce the recovery, by showing a partial failure of consideration, or of performance, as well as repel the entire demand by proof of a *total failure*. (Barten v. Butler, 7 East. 479; Poulton v. Lattimore, 9 B. & Cr. (17 E. C. L.) 259; Withers v. Greene, 9 How. 227 & seq.; Van Buren v. Digges, 11 How. 475; 1 Pars. Cont. 520 to 526 & notes.)

And in Virginia, even where the contract is *under seal*, a failure of consideration is available in defence, by means of a plea setting it forth, alleging the damages thereby sustained, and offering to *set them off* against the plaintiff's demand. (V. C. 1873, ch. 168, § 5; V. C. 1887, ch. 160, § 3299; 5 Rob. Pr. 611, 1002; 4 Min. Insts. 661.)

3^h. The Doctrine Propounded in *Britton v. Turner* (6 N. Hamp. 481).

This case proposed further very judicious innovations upon the original doctrine, which unfortunately have failed to command a general judicial support. Thus, according to that case, a contract *entire in point of time*, or otherwise, must be completely performed before there can be any recovery upon it; nor will the law raise any implied agreement differing from the express. Hence the employer may decline to avail himself of a partial or incomplete performance, and then the other party *can recover nothing*, how much soever he may have done. But if the employer actually *receives benefit* from the work or service, he must pay *pro rata* upon an *implied* promise, deducting, however, from the *pro rata* recovery whatever loss he has suffered from the failure to perform, in which case he can deduct no more than the *value of the work*; or he may forbear to insist on the reduction, and in a separate action may recover *unlimited damages*, such as a jury may allow. (1 Pars. Cont. 524, n. (p); 2 Chit. Cont. (11 Am. ed.) 845, n. (d³).)

4^s. Effect of *Sickness of the Servant* upon wages.

Without an agreement to that effect, express, or implied from usage or otherwise, there is *no abatement* of the wages for sickness, where the servant is hired *for a term*, e. g., for a year, a quarter, a month, &c. (George v. Elliott, 2 Hen. & M. 6; Rutherf. Inst't, B. I, c. xviii. § 25; Stor. on Cont. § 962; 1 Pars. Cont. 519, n. (i.); Id. 527, n. (x.); R. v. Ludbrooke, 1 Smith's R. 69; Chandler v. Grieves, 2 H. Bl. 606, n; Add. Cont. 742.)

It must be admitted, however, that this proposition is

open to considerable doubt. Where a servant is prevented, by sickness or other inability, occasioned by a visitation of Providence, from laboring during the stipulated period, the authorities are well nigh unanimous in holding that he may recover for the services actually performed, upon a *quantum meruit*; the amount to be recovered depending upon the extent of the benefit which the employer has derived from the partial performance. But the recovery of wages while the party is sick and unable to render any service, is opposed by not a few American cases. (2 Chit. Cont. (11 Am. ed.) 849; *Fenton v. Clark*, 11 Vermt. 557; *Fuller v. Brown*, 11 Met. (Mass.) 440; *Seaver v. Morse*, 20 Vermt. 620; *Nichols v. Coolahan*, 10 Met. (Mass.) 449; *Hunter v. Waldron*, 7 Ala. 753; *Hillyard v. Crabtree*, 11 Tex. 264; *Ryan v. Dayton*, 25 Conn. 188.)

5^a. Dissolution of Contract of Service.

The dissolution of a contract of service may arise, (1). By mutual consent; (2). By act of the master; (3). By the act of the servant; and (4). By the act of God;

W. C.

1^b Dissolution of Contract by *Mutual Consent*.

In case of the dissolution of the contract by mutual consent, no new contract arises as of course, *by implication of law*, in favor of the servant, enabling him to recover wages *pro rata*, for the service already rendered, without a new agreement to that effect, but such agreement may be inferred from all the circumstances, if they seem to warrant it. (*Thomas v. Williams*, 1 Ad. & El. (28 E. C. L.) 685; *Lamburn v. Cruden*, 2 Mann. & Gr. (40 E. C. L.) 258.)

2^b. Dissolution of Contract by *Act of the Master*:

We must here note two cases, namely: (1), Where there is just cause of dismissal; and (2), Where there is no just cause;

W. C.

1ⁱ. Where there is *Just Cause of Dismissal*; w. c.

1^k. Consequence of Dismissal for *Just Cause*;

Upon the principle of *entirety of contract*, a servant properly discharged for misconduct is not, in England, entitled to wages from the beginning of the current quarter, or period since the last pay-day, to the time of discharge. (2 Chit. Cont. (11 Am. ed.) 844; *Atkin v. Acton*, 4 Carr. & P. (19 E. C. L.) 208; *Turner v. Robinson, &c.* 6 Carr. & P. (25 E. C. L.) 15; *Ridgway v. Hungerford*, 3 Ad. & El. (30 E. C. L.) 171; *Lilly v. Elwin*, 11 Q. B. (63 E. C. L.) 742.) And although a different doctrine prevails in South Carolina, Tennessee, Maine, and other States of the Union, and the servant is allowed to recover, even after a dismissal for good cause, at least so far as his services have been of benefit to his employer,

(2 Chit. Cont. (11 Am. ed.) 848; Eakin v. Harrison, 4 McCord (S. C.), 249; Byrd v. Boyd, 4 McCord, (S. C.) 246; [17 Am. Dec. 741]; Jones v. Jones, 2 Swan. (Tenn.), 605; Lawrence v. Gullifer, 38 Maine, 532); yet the doctrine above stated from the English cases, namely, that where a servant is dismissed for just cause, he can recover no compensation for his services, either on the contract, or on a *quantum meruit*, is believed to be generally established in the United States. (2 Chit. Cont. (11 Am. ed.) 844, and n. (d³).)

2^k. What is a Good Cause of Dismissal.

Moral misconduct (pecuniary or otherwise), wilful disobedience, habitual neglect, or any conduct injurious to the master's interests, *e. g.*, persuading or assisting an apprentice to desert, &c., are instances of causes which justify dismissal; and if such cause exists, it justifies the dismissal, although it was not the inducing motive thereto, nor was even known to the master at the time. But temporary absence without leave, occasional sulkiness, &c., do not amount to sufficient cause. (Spain v. Arnott, 2 Stark (3 E. C. L.) 256; Atkin v. Acton, 4 Carr. & P. (19 E. C. L.) 208; Callo v. Brouneker, 4 Id. 518; Fillieul v. Armstrong, 7 Ad. & El. (34 E. C. L.) 557; Lacy v. Osbaldiston, 8 Carr. & P. (34 E. C. L.) 80; Amor v. Fearon, 9 Ad. & El. (36 E. C. L.) 548; Read v. Dunsmore, 9 Carr. & P. (38 E. C. L.) 588; Ridgway v. Hungerford, 3 Ad. & El. (30 E. C. L.) 171; Mercer v. Whall, 5 Q. B. (85 E. C. L.) 466; 1 Pars. Cont. 526; Id. 521, and n. (K.); 2 Chit. Cont. (11 Am. ed.) 844 & seq.; Add. Cont. 746-7.)

2ⁱ. Where there is *not Just Cause of dismissal*.

Where a servant is hired for a certain time (as a year, quarter, month, &c.), and is wrongfully dismissed before the expiration of the time, he may elect amongst these three remedies (Cutter v. Powell (6 T. R. 320), 2 Smith L. C. 27; Emmens v. Elderton, 13 C. B. (76 E. C. L.) 509; Rogers v. Parham, 8 Cobb (Ga.) 190; Sedgw. Dam. 223-4); namely:

(1), To bring a special action for the master's breach of contract in dismissing him; and this remedy he may pursue *immediately*. (Pagani v. Gandolfi, 2 Carr. & P. (12 E. C. L.), 370.) The measure of recovery is the amount of damages actually sustained by the servant in consequence of the illegal dismissal. (Willoughby v. Thomas, 24 Grat. 531, 533; Byrd v. Boyd, 4 McCord. (S. C.) 241, [17 Am. Dec. 741].) And hence the master may show, for the purpose of reducing the damages, that after the servant was dismissed, he had engaged in other business, not less gainful, or that he had been offered and had declined employment of the same general nature as that

from which he had been dismissed; but not a different kind of employment, nor one to be conducted at another place. But the opportunity to be so employed is not to be presumed; it must be affirmatively shown by the master. (Same cases; *Costigan v. Mohawk & H. R. R. Co.* 2 Denio (N. Y.), 609; *Jones v. Jones*, 2 Swan. (Tenn.), 605; *Pond v. Wyman*, 15 Mo. 175; *Shannon v. Comstock*, 21 Wend. (N. Y.) 459; *Emmens v. Elderton*, 13 C. B. (76 E. C. L.) 495, 508, 519.)

(2), To wait until the expiration of the period for which he was hired, and then he may *perhaps* sue for and recover his *whole wages*, on a general count for work and labor, relying on the doctrine of *constructive service*. (*Gandell v. Pontigrey*, 4 Campb. 375; *Collins v. Price*, 5 Bingh. (15 E. C. L.) 132; *Smith v. Hayward*, 7 Ad. & El. (34 E. C. L.) 544.) But the better opinion seems to be that the whole wages cannot in any case be recovered upon the *general count* for work and labor. (2 Chit. Cont. (11 Am. ed.) 855; *Goodman v. Pocock*, 15 Q. B. (69 E. C. L.) 576, 581, 583; *Emmens v. Elderton*, 13 C. B. (76 E. C. L.) 495, 507; *Derby v. Johnson*, 21 Vermt. 17; *Moulton v. Trask*, 9 Met. (Mass.) 577; *Clark v. Marsiglia*, 1 Denio. (N. Y.) 317); or

(3), To treat the contract *as rescinded*, and to sue immediately on a *quantum meruit*, for the work actually performed. (*Archard v. Hornor*, 3 Carr. & P. (14 E. C. L.) 349; *Planché v. Colburn*, 8 Bingh. (21 E. C. L.) 14.)

See *Hartley v. Harman*, 11 Ad. & El. (39 E. C. L.) 798; *Lilly v. Elwin*, 11 Q. B. (63 E. C. L.) 755; *Smith, M. & S.* p. 95; *Field on Damages*, § 340.

3^d. Dissolution of the Contract by the Act of the Servant.

This topic is to be treated in the same manner as the dissolution of the contract by the act of the *master*; that is to say, we must note the two cases, (1), Where there is just cause for the servant's withdrawal; and (2), Where there is not such just cause;

W. C.

1st. Where there is *Just Cause of Withdrawal*; w. c.

1^k. Consequences of Servant's Withdrawal *for Just Cause*.

The servant may recover his wages *pro rata* upon a *quantum meruit*. (1 Pars. Cont. 524, n. (o).)

2^k. What is Just Cause for Servant's Withdrawal.

Personal chastisement by the master, when he has no power to inflict chastisement, is a just cause for the servant's withdrawal. So, also, cruel or immoderate correction where he has power to administer correction; or sickness of the servant such as to prevent his performance of the stipulated service, &c., are just causes for a servant's withdrawal; and a *minor* (not an apprentice), may

withdraw *at pleasure*, and yet recover his wages *pro rata*. (1 Pars. Cont. 524, n. (o); Id. 522, n. (1); Bac. Abr. Master & Ser. (N).)

- 2ⁱ. Where there is *not Just Cause* for Servant's Withdrawal.

The servant *can recover no wages*. (1 Pars. Cont. 522-523 & notes; 2 Chit. Cont. (11 Am. ed.) 844 & n. (d³), 848 & notes.)

- 4^b. Dissolution of Contract *by Act of God*.

If the contract be determined *by the death* of the servant, although it be *entire*, yet the wages are recoverable *pro rata*, which would seem to be a concession to the hardship of the case. (George v. Elliott, 2 Hen. & M. 5; Ruthersforth Inst. B. I., c. XIII., § 25; Davis v. Maxwell, 12 Mete., 286.) The case of Plymouth v. Throgmorton, 1 Salk. 65, is contrary, upon the ground of the *entirety* of the contract, and of the maxim "*annua nec debitum, judex non separat*." In Virginia it seems settled in favor of apportioning the wages by the law in like case in respect to slaves, and by the *analogy*, if not by the *terms*, of the statute touching apportionment. (V. C. 1873, ch. 136, § 1; V. C. 1887, ch. 129, § 2810; *Ante*, p. 190, 2^k.) See Addis. Cont. 743; 2 Pars. Cont. 33; Exp. Smith, 1 Swanst. 337. And it is the established doctrine that, in case of a seaman, wages are recoverable to the *time of his death*, but not, according to the better opinion, to the end of the voyage. (2 Pars. Ship. & Adm. 58 & n. 4.)

- 6^c. Effect of Marriage of Female Servant on Contract of Service.

She must still serve her time out, and her husband cannot lawfully take her away; nor, on the other hand, is the mere fact of the marriage a sufficient ground on which to discharge her, supposing her ability and willingness to render the stipulated service not to be thereby impaired. (5 Burn's Just. 605-6; Com. Dig. Justices of Peace, (B. 6, 3).)

- 7^c. Authority of Master over Servant; w. c.

- 1^h. Doctrine at Common law.

The servant must obey his master's orders, even though they involve a painful sacrifice of feeling (*i. g.*, omitting to visit a very ill parent); and for wilful disobedience he may be discharged. The master, however, is bound to take as much care of his servant as he would of himself, and may not expose him to danger. (1 Pars. Cont. 520-21, 528; Priestly v. Fowler, 3 Mees. & W. I; Turner v. Mason, 14 Do. 112.)

The master may also chastise his servant (if *under age*), with moderation, for neglect of duty, abusive language, &c.; and it is even said that the common law permitted him to correct *any servant*, of whatever age, so it were done in reason. But this last proposition must be re-

garded as more than doubtful. (1 Bl. Com. 428; 5 Burr's Just. 761; Bac. Abr. Master, &c. (N.).)

2^b. Doctrine *by Statute* in Virginia.

The master may exercise over any *minor*, hired for a period *not less than one month*, the same authority, control and discipline as over an apprentice, unless it be otherwise stipulated in the contract of hire. (V. C. 1873, ch. 122, § 4; V. C. 1887; ch. 115, § 2584.)

8^c. Obligation of Master in Respect of the Servant.

The obligation of the master in respect of the servant leads us to advert to, (1), The master's obligation as to wages; (2), As to maintenance; (3), As to medicines and medical attendance; (4), As to the servant's personal safety; and (5), As to indemnifying the servant;

W. C.

1^b. The Master's Obligation in *Respect of Wages*.

The master is under a legal obligation to pay wages according to contract, express or implied, and the retainer is presumed to be *in consideration of wages*, unless the contrary appear. (1 Bl. Com. 428 & n. (18); 1 Tuck. Com. 77, B. I; Bac. Abr. Master, &c. (N.); 1 Pars. Cont. 530 '31, & notes (d) and (e); *Ante*, pp. 189, 198, 208.)

All compensation, however, may be forfeited by the servant's gross misconduct. Thus, if an agent or trustee deliberately retain trust funds in his own hands, appropriate them to his own use, and refuse or fail for years to render any account to the principal, he is held to forfeit all claim to compensation. (*Segar v. Parrish*, 20 Grat. 681-'2.)

W. C.

1ⁱ. When Payment of Wages is *Presumed*.

Where it has been *usual to pay weekly*, etc., and a considerable time has elapsed, and particularly if the servant has left the master's employment, payment of arrears of wages is presumed. (*Sellen v. Norman*, 4 Carr. & P. (19 E. C. L.) 80; 1 Pars. Cont. 532; 2 Chit. Cont. (11 Am. ed.) 856, 1103.)

2ⁱ. When Payment of *Infant's Wages* will be Allowed;

W. C.

1^k. Allowance of Payments, as *against the Parent* of the Infant Servant.

The *father certainly*, and possibly, if he be dead, the *mother*, is entitled to the earnings of an infant child, unless the parent *relinquishes the claim*, which, however, is easily implied, as where the child has for some time been permitted, without objection, to receive his wages himself. Payments *to the parent*, therefore will in general be valid. (1 Pars. Cont. 257-8; 2 Chit. Cont. (11 Am. ed.) 213, n. (K.).)

2^k. Allowance of Payments, *as against the Infant Himself.*

Payments *in money* to the infant (supposing him entitled to receive his wages), are always valid, but payments *in supplies* which are *not necessities*, or in money paid *by the master* for such supplies (*e. g.*, a silk dress for a female servant), may be disaffirmed by the infant. (*Hedgeley and Wife v. Holt*, 4 Carr. & P. (19 E. C. L.) 194; 1 Pars. Cont. 528, n. (x.).)

3ⁱ. Set-off against Wages, of the Value of Things Lost or Broken by Gross Negligence of Servant.

Not allowed except by agreement. Master must bring his action for damages. (*Le Loir v. Bristow*, 4 Campb. 134; Addis. on Cont. 743.)

2^h. Master's Obligation *in respect to Maintenance.*

It depends on the terms of the contract; but *prima facie*, the master, it is believed, is bound to supply board, at least in the case of laborers, menials, and apprentices, unless it be otherwise agreed, either expressly, or by implication, as by general usage &c.

3^h. Master's Obligation in respect to *Medicines and Medical Attendance.*

The master is not bound to supply these to a *hired* servant, whether menial or laborer (as he is to an apprentice, *Ante*, p. 203, 1ⁱ), unless by *special agreement*, not even though the illness were caused by an accident occurring in the master's service. But if the master himself send for the medical man, he is responsible to *him*, and it is said cannot deduct the amount paid from the servant's wages, unless it be so agreed, which, *if it be so*, probably arises from its being deemed an act of charity and good will, arising naturally out of the relation, and therefore not warranting the *implication of a promise* to repay. (*Sellen and Wife v. Norman*, 4 Carr. & P. (19 E. C. L.) 80; *Cooper v. Phillips*, Id. 581; *Rex v. Smith*, 8 Carr. & P. (34 E. C. L.) 153; *Newby v. Wittshire*, 4 Dougl. (26 E. C. L.) 284; *Wemall v. Adney*, 3 Bos. & Pul. 247; 2 Chit. Cont. (11 Am. ed.) 857; 1 Bl. Com. 425, n. †.)

In case of *slave servants*, the doctrine in Virginia was precisely analogous; that is, medical bills were to be paid *ultimately* by the owner, and not by the temporary hirer, although the doctor might exact the amount from the hirer, if *he* employed him. (*Easley v. Craddock*, 4 Rand., 425; *Isbell's Adm'r v. Norvell's Ex'or*, 4 Grat. 176.)

4^h. Master's Obligation in respect to the *Personal Safety* of the Servant; *w. c.*

1ⁱ. In Regard to Employment.

The master has no right to expose his servant to danger without the latter's consent, and is bound to provide for the servant's safety in the course of his employment,

to the best of his judgment, information and belief; but he is not responsible for an accident happening in the course of his service, without his default, unless he knew that it exposed the servant to peculiar danger, and the servant did not. (*Priestly v. Fowler*, 3 Mees. & W. 6; 1 Pars. Cont. 528; *Union Pac. R. R. Co. v. Fort*, 17 Wal. 557.)

The hirer of a slave was restricted by a similar limitation. He was not at liberty to engage him in a peculiarly dangerous employment without the master's assent; and if he *perverted* him from the agreed or represented purposes for which he hired him, he was answerable for the consequences which *ensued from such perversion*, although he was guilty of no negligence, nor of any default other than the perversion. (*Spencer v. Pilcher*, 8 Leigh, 566; *Harvey v. Epes*, 12 Grat. 153; *Harvey v. Skipwith & als.*, 16 Grat. 393; *Bell v. Bowen*, 1 Jones, N. C. Law, 316; *Randolph v. Hill*, 7 Leigh, 383.)

2. In regard to Injuries Arising from the *Default of Fellow-Servants*.

If the master has selected as his servants persons of *competent care and skill*, having reference to the employment, and is not himself guilty of any neglect or default in the structure or management of the buildings or machinery, or in the conduct of the business about which the servant is employed, he (the master) is not answerable to one servant for injuries occasioned by the negligence of a fellow-servant in the *course of their common business*. But if the injury occurs to the party injured when he is not actually employed in the common business, the master is responsible. Hence, the servant of a railroad company injured whilst travelling on the road of his employers, about *their business*, by the carelessness of other employees of the company, cannot recover of the latter, unless the injury resulted from the employer's default, but he might have recovered had he been travelling on his *own business*. (*Pierce on Railroads*, 358 & seq. *Priestly v. Fowler*, 3 M. & W. 1; *Hutchinson v. York, &c., Railway Co.*, 5 Excheq. 351; *Wignore v. Jay*, Id. 357; *Clarke v. Holmes*, 7 H. & N. 943, 947; *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Bartonshill Coal Co. v. Reid*, 3 Id. 266; *Bartonshill Coal Co. v. McGuire*, 3 Id. 307; 1 Am. Lead. Cas. 620; *Farwell v. B. & W. Railway Corp.*, 4 Mete. (Mass.) 49; 1 Pars. Cont. 528; *Union Pac. R. R. Co. v. Fort*, 17 Wal. 557; *Packet Co. v. McCue*, Id. 508; *Ford v. Fitchburg R. R. Co.* 110 Mass. 241; *Hugh v. Railway Co.* 10 Otto, 100 U. S. 214.)

The precise meaning and effect of the words "common carrier" are set forth in *Pierce on Railroads*, 361 & seq.

See *Chic. M. & St. P. Railway Co. v. Ross*, 112 U. S. 377. A railway company is held liable to an engineer upon a locomotive for the negligence of the *conductor* of the train, because the latter has authority and represents the company.

5^h. Master's Obligation in respect to *Indemnifying Servant*.

The master is under an implied obligation to indemnify his servant against all pecuniary damages incurred by him, without his own (the servant's) fault, in the *course of the employment*, and in consequence of it. (*D'Arcy v. Lyle*, 5 Binn (Pa.) 441; 1 Am. Lead. Cas. 691; *Smith's Merc. L.* 109-'10.)

2^f. Peculiar Privileges of Apprentices in Carrying on Trade.

These privileges result from many English statutes (which have not been enacted in Virginia), the general object and policy of which are to secure to the country *a class of skilled artisans*. (1 Bl. Com. 427-'8; Bac. Abr. Master, &c. (D.).)

3^f. Doctrine Touching Homicide of Masters by Servants.

By Stat. 25 Edw. III., c. 2, homicide of masters by servants was declared *petit treason*, and punished with cruel severity. But in Virginia it is treated as *any other homicide*, the distinction as to *petit treason* being abolished. (4 Bl. Com. 203; Synops. of Crim. L. 60; V. C. 1873, ch. 195, § 4; V. C. 1887 ch. 190, § 3882.)

4^f. Obligation of Master Touching *Testimonials to Servant's Character*; w. c.

1^g. Obligation of Master to *give Testimonials* to Character.

No such obligation exists. (1 Pars. Cont. 529.)

2^g. Liability of Master on *Account of Testimonials*; w. c.

1^h. Liability to *Servant*.

Whether the character be given voluntarily or by request, it is a *privileged communication*; and in order to make the master responsible, it must be, not only *false*, but *malicious*; and the malice is not implied, as in other cases, from the falsity, nor from the occasion of speaking, but it *must be proved*. That the communication is voluntary, is a circumstance to be considered in determining the *bona fides* of it. (*Child v. Affleck*, 9 B. & Cr. (17 E. C. L.) 403; *Rogers v. Clifton*, 3 Bos. & Pul. 587; 1 Pars. Cont. 529.)

2^h. Liability to *Third Person*.

A third person injured by the master's false representation (knowingly), of good character in the servant, may recover of the master; for *fraud and damage* together always constitute a cause of action. (*Pasley & als. v. Freeman*, 3 T. R. 51; *Vernon v. Keys*, 12 East. 632; *Tapp & als. v. Lee*, 3 Bos. & Pul. 367; 1 Chit. Pl. 157.)

5^f. Doctrine Touching *Liability of Servant to Master*; w. c.

1^g. Liability of Servant, in respect to *Duration of Service*.

If the service is *entire*, in point of time, or otherwise, the

servant must perform it *completely*, before he can demand his compensation, although if part be paid (not exceeding the proportion of service rendered), the master cannot recover it back. (1 Bl. Com. 425, n. †; Id. 428, n. (18); *Ante*, pp. 210 & seq., 3*; 1 Pars. Cont. 522 & seq., and n. (d), &c.)

2*. Liability of Servant, *in respect of his Conduct*; w. c.

1^b. When the Servant Receives a Reward.

He must observe with diligence and care the interest of his master, as the master himself would do; must adhere to his reasonable orders, and is liable for not doing so, but is not liable for a loss *by robbery*, without his default. (1 Bl. Com. 428, n. (16); 6 Rob. Pr. 1016 & seq.; Countess of Shrewsbury's Case, 5 Co. 14 a; Lord North's Case, 2 Dyer, 161 a; Catlin v. Bell, 4 Campb. 183; Shiells v. Blackburne, 1 H. Bl. 161; Bac. Abr. Master, &c. (M.) 1; Bernard v. Maury & Co., 20 Grat. 434.)

Hence a factor who sells produce on credit when instructed to sell *for cash*, is liable for any loss which may ensue; and if he use the proceeds of sale *as his own*, as by keeping them amongst his general deposits in bank, he is liable for any resulting loss. (Hairston v. Medley, 1 Grat 96; Johnson & al. v. O'Hara, 5 Leigh, 456.) On the other hand, if he treats the money as belonging to the principal, as by depositing it to the principal's credit in bank, or to his own credit *as agent*, or even to his own individual credit, he having no money of his own on deposit there, and designing it for the principal's benefit, he is not liable for a loss arising from the insolvency of the bank, supposing him to have exercised due care in the selection, and due vigilance; nor from the failure of the currency (*e. g.*, Confederate currency) in which the collection was made. Neither is he guilty of any default, in the absence of instructions to the contrary, in receiving for his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and *passes as such at par*. In order that he may be justified in receiving a depreciated currency, however, there must be some special circumstances showing that, expressly or by implication, his authority warranted it. (Ward v. Smith, 7 Wal. 452; Alley & als. v. Rogers, 19 Grat. 383-4; Ewart v. Saunders, 25 Grat. 207; Pidgeon v. Williams, 21 Grat. 251; Davis v. Harman, Id. 194, 203; Hale v. Wall, 22 Grat. 424, 432, 434.) And as long as money or property belonging to a master, or even its product or substitute, can be *traced or distinguished* in the hands of the agent, or his assignees (unless for value and without notice), the master may recover it. (Norfolk Overseers v. Bank of Va., 2 Grat. 544; Veil & als. v. Mitchell's Adm'r, 1 Am. L. C. 650.)

Pre-eminent knowledge and uncommon foresight are not to be required in an agent. Common skill, common prudence and common caution are all that can be demanded. It is unreasonable to judge of his conduct from subsequent events. If he has acted within his power, in good faith, and with fair discretion, he is not to be held responsible for losses which may have accrued from his management. (*Myers' Ex'or v. Zetelle*, 21 Grat. 733; *Watkins v. Stewart*, 78 Va. 114.) And it should be observed that, as a general rule, the question of negligence on the part of an agent is a question of *fact*, to be determined by the *jury*, and not a question of *law*, to be adjudged by the *court*. The court can only be called upon to pronounce upon a question of negligence where the facts are *undisputed*, and the party has failed in a *clear legal duty*, or where the inferences to be drawn from the evidence are so certain and incontrovertible that fair-minded men cannot differ in respect to them. (*Carrington v. Ficklin*, 32 Grat. 676-'7; *R. R. Co. v. Stout*, 17 Wal. 663-'4; *D. & M. R. Co. v. Von Steinberg*, 17 Mich. 120, 123; *W. C. & P. R. Co. v. McElwees*, 67 Penn. 315; *Barron v. Eldridge*, 100 Mass. 459; *Doorman v. Jenkins*, 2 Ad. & El. (29 E. C. L.) 80.)

The remedy for the principal or master, against the servant or agent, supposing that there is no contract *under seal* on the agent's part, may be either trespass on the case, as *for a tort*, or trespass on the case *in assumpsit*. Where there is an express promise, whence results a legal obligation, the plaintiff's cause of action is most accurately described in assumpsit, in which the promise stated is the gist of the action. But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, then, although assumpsit is maintainable upon the promise implied by law to do the act, yet an action on the case founded *in tort* is the most proper form, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the legal obligation itself, the breach of it, and the damage resulting from that breach. For the latter is the most accurate description of the real cause of suit, and that form of action in which the real cause of complaint is most accurately described is in general to be preferred. (1 Chit. Pl. 151 & seq.; 3 Rob. Pr. 423, 436, & seq.; 4 Do. 336 & seq.; *Burnett v. Lynch*, 5 B. & Cr. (12 E. C. L.) 589.) Assumpsit was employed in *Shiells v. Blackburn*, 1 Hen. Bl. 158; *Russell v. Hankey*, 6 T. R. 12; *Catlin v. Bell*, 4 Campb. 183; and *Chapman v. Walton*, 10 Bingh. (25 E. C. L.) 57; and case in *Hussey v. Pacy*, 1 Lev. 188; *Lawson v. Kirk*, 3 Cro. (Jac.) 266; *Moore v. Mourgue*,

Cowp. 480; *Smith v. Elder*, 3 Johns. (N. Y.) 105; *Franklin Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 131; *Bank of Wash. v. Triplett*, 1 Pet. 25; *Bernard v. Maury & Co.*, 20 Grat. 434.

2^h. When the Servant Receives *no Reward*.

He is liable only for *gross negligence*, or *fraud*, and for *non-festusance* not at all, for want of consideration. (*Shiells v. Blackburn*, 1 H. Bl. 162; *Coggs v. Bernard*, 2 Lord Raym. 913, &c.; *Elsee v. Gatward*, 5 T. R. 144; *Pate v. McClure*, 4 Rand. 164, 173; *Carrington v. Ficklin*, 32 Grat. 677.)

3^g. Liability of Servant in Respect of *Unlawful Appropriation* of Master's Goods; w. c.

1^h. Where they are Entrusted to the Servant for a *Special Purpose*.

The appropriation is *larceny*, for his possession is that of the master, *e. g.*, in case of plate appropriated by a butler, &c. (*Synops. Crim. L.* 96; 2 Russ. Cr. 197; *Walker's Case*, 8 Leigh, 743; *Bac. Abr. Master*, &c. (M.) 2.)

2^h. Where the Servant has not merely the *Possession* for a *Special Purpose*, but the *Qualified Ownership*.

At common law, it was only a breach of trust, or *embezzlement* (*e. g.*, cloth committed to a tailor, &c.); but by statute in Virginia, embezzlement by *public and bank-officers*, and by *common carriers*, and now by any person, of property which he has *received* for another, is punished like larceny. (1 Bl. Com. 230 and n. (3); *Bac. Abr. Master*, &c. (M.) 2; *Synops. Crim. L.* 96 & seq.; V. C. 1873, ch. 188, §§ 20, 21; V. C. 1887, ch. 181, §§ 3716 to 3718.)

4^g. Liability of Servant in respect of *Rendering Accounts*.

It is the duty of a servant to keep a correct account of all money transactions, and to render the same to the principal, with proper frequency, or whenever called on; and such an account has been exacted by a court of equity after the lapse of twenty years, although generally, after a considerable period, a settlement will be presumed. (*Pars. Cont.* 76-7; *Smith's Merc. Law*, 157 & seq.; *Robertson v. Read's Adm'r*, 17 Grat. 544.)

6^f. Doctrine Touching Servant's Dealing *for his own Benefit* with the Subject of the Agency.

See *Post*, p. 243, 3^g; 1 *Pars. Cont.* 75-76; *Stor. Agency*, §§ 210-215; 1 Wh. & Tud. L. C. 125, &c.; *Segar v. Edwards*, 11 Leigh, 213; *Buckles v. Lafferty*, 2 Rob. 292, 302, Reporter's Note; *Bailey's Adm'r v. Robinson*, 1 Grat. 4, 9, 10; *Howery v. Helms & als.* 20 Grat. 1, 7, &c.

4^e. The manner in which *Strangers* may be affected by the Relation of *Master and Servant*.

The master is, or ought to be, concerned by a natural senti-

ment of sympathy, as well as interest, in wrongs done to his servant, and thereby is engaged to assist him in obtaining redress.

He is also personally interested in such acts of third persons as interfere with the service which the servant has stipulated for.

And lastly, upon the principle *qui facit per alium, facit per se*, he may be answerable for, and interested in, the conduct of his servant. (1 Bl. Com. 429 & seq. and notes; 1 Chit. Cont. (11 ed.) 281 & seq.; 2 Do. 859 & seq.; 1 Pars. Cont. 38 & seq.; Id. 86 & seq.; Bac. Abr. Master, &c. (I.), (K.), (L.), (O.), & (P.).)

In considering the manner in which strangers may be affected by the relation of master and servant, we are to regard, (1), The doctrine of mutual personal defence, and of maintenance of suits as between master and servant; (2), The doctrine of seducing away or retaining of another's servant; (3), The doctrine touching personal torts done to servants; and (4), The doctrine touching contracts made, and acts done, by a servant in connection with his employment;

W. C.

- 1^f. Doctrine touching the Right of Mutual Personal Defence, and of *Maintenance* of Suits, as between Master and Servant;

W. C.

- 1^g. Doctrine touching the Right of Mutual *Personal Defence*.

Each may justify or extenuate an assault, or even homicide, in defence of the person of the other, in like manner as in defence of *his own person*. (1 Bl. Com. 429; Bac. Abr. Master, &c. (P.); Synops. Crim. L. 40, 43, 141.)

- 2^g. Doctrine touching Mutual *Maintenance* of One Another's Suits.

The master may assist the servant *in a suit* against a stranger; whereas, in general, such an act (*e. g.*, helping to bear the expense, or even giving public countenance to the litigants), is an offence against public justice, known by the name of *maintenance*. (1 Bl. Com. 429; Synops. Crim. L. 141; Bac. Abr. Master, (P.).) And the servant, on his part, may afford his master every other assistance in his suits, *except advancing money*. (Bac. Abr. Master, &c. (P.).)

- 2^f. Doctrine touching the *Seducing Away or Retaining* of the Servants of Others.

The servant who yields to such seduction, or retainer, is always liable to an action, and the new master also, if he knew of the servant's previous engagement. (1 Bl. Com. 429, & n. (20); Bac. Abr. Master, &c. (O.); 1 Pars. Cont. 532.)

- 3^f. Doctrine touching *Personal Torts* done to Servants; w. c.

- 1^g. Where the Injury does *not affect the Servant's Capacity* to render the Stipulated Service.

In general, no action lies at the suit of the master who

cannot make the indispensable averment (at common law) of *loss of service*; but the servant may *always sue*, whether the master can or not. (1 Bl. Com. 429; Bac. Abr. Master, &c. (O).)

2^g. Where the Injury *does Affect the Capacity* of the Servant to Render Service.

The master may, in general, recover damages sufficient to compensate the loss of service.

In the case of the seduction of a *female servant*, the master recovers damages *per quod servitium amisit*; but the injury really suffered in that way may not be the measure of recovery. Thus, *a parent* can only maintain an action for the *seduction of his daughter*, by virtue of her occupying to him the *relation of servant*, and at common law not only must that relation be proved to exist, but actual *loss of service* must also be shown, although the slightest suffices. In Virginia it is still requisite to prove the *relation* of master and servant, but proof of *loss of service* is dispensed with. Always, however, the *gist* of the action has been, and is, the *grievous wrong* done to the feelings of the parent, and the good name of the family. (3 Bl. Com. 140, n. (27); Bac. Abr. Master, &c. (O.); Campbell v. White, 13 Grat. 573; V. C. 1873, ch. 145, § 1; V. C. 1887, ch. 137, § 2896; Lee v. Hodges, 13 Grat. 726; Clem v. Holmes, 33 Grat. 724-5; Sargent v. ———, 5 Cow. (N. Y.) 115.) And it seems that, if the father be dead, the mother may maintain such an action; at least where the relation of mistress and servant is proved to have actually existed between them, at the time of the seduction. (Cooley, Torts, 233; Sargent v. ———, 5 Cow. (N. Y.) 115; Moak's Underhill, Torts, 343; Gray v. Durland, 50 Barb. (N. Y.) 100, 51 N. Y. 424; Furman v. Van Sise, 56 N. Y. 435; Bartley v. Richtmyer, 4 New York, 38, [S. C. 53 Am. Dec. 338, 341, 349, note].)

In other cases than that of seduction of a female servant, where the injury to the servant results from force or negligence, the measure of the master's *damage*, and consequently of his recovery, is the *loss of service*. (1 Bl. Com. 429, n. (20); 3 Do. 142; Bac. Abr. Master & Ser. (10); Bartley v. Richtmyer, 4 New York, 38, [S. C. 53 Am. Dec. 338, 339]; Cowden v. Wright, 24 Wend. (N. Y.) 429, [S. C. 35, Am. Dec. 633].)

Where the injury done amounts to a *felony*, the civil wrong to the master is said to be, at common law, *merged in the felony*; or rather the master is stayed in seeking civil redress, it is said, until the wrong-doer has been either acquitted or convicted of the felony. If this is indeed the common law doctrine, which has been gravely doubted (Cook v. Darby, 4 Munt. 447; Allison v. Bank, 6 Rand. 233), it arose from two considerations: 1st, lest public justice

should suffer, by permitting the injured party to obtain private redress before he has prosecuted, as is his duty, the public crime; and 2d, because, if guilty of felony, the offender, upon conviction, forfeited all his goods to the Crown, and also his lands for his life and a year and a day, and so had nothing wherewith to satisfy a private action. (4 Bl. Com. 6; Bac. Abr. Master & Ser. (O).) But in Virginia it is provided by statute that the commission of a felony shall not stay or merge the civil remedy of one injured by the felonious act. (V. C. 1873, ch. 195, § 6; V. C. 1887, ch. 190, § 3884.)

4f. Doctrine touching Contracts made and Acts done by a Servant in Connection with his Employment.

A large proportion of the business of life must necessarily be carried on by persons not acting in their own right, or from their own intrinsic authority over the subject-matter, but under a power derived from others, who are invested with original dominion, authority, and right over such subject-matter. Hence the general maxim of the law, subject to only a few exceptions, is that, whatever a man *sui juris* may himself do, he may do by another, which is expressed by the maxim, *qui facit per alium, facit per se*. He who, being *sui juris*, and competent to do any act for his own benefit, or on his own account employs another about any transaction, is called the *principal*, employer or master; and he who is thus employed is styled the *agent*, servant, attorney, or proxy. The relation thus created between the parties is termed an *agency*; the power delegated is known in law as an authority; and the act, when performed, is often denominated an act of agency or *procuratio*, the latter phrase being derived from the Roman law, and signifying the same thing as agency. (Stor. Agency, §§ 2, 3; 1 Bl. Com. 429-'30.)

The acts and doings of an agent, which the principal may authorize, and for which he will therefore be answerable, may be either in the nature of *contracts* or of *torts*—that is, wrongs other than the breach of contract. (1 Bl. Com. 430.)

Let us take notice of, (1), The doctrine touching *contracts* made by a servant in behalf of his master; (2), The doctrine touching *torts* committed by a servant in connection with his employment; and (3), The doctrine touching the servant or agent dealing for his own benefit with the subject-matter of the agency;

W. C.

1^a. Doctrine touching *Contracts* made by Servant in behalf of his Master; w. c.

1^b. Liability and Rights of Master and Servant, respectively.

We will observe, (1), The liability of the *master* on the contracts made by the *servant*; and (2), The liability of the *servant* on contracts made by him on behalf of the *master*;

W. C.

1ⁱ. Liability of *Master* on the Contracts made by the Servant.

The doctrines relating to the liability of the master on contracts made by the servant, arrange themselves under these heads: (1), The mode of creating authority to servant to contract; (2), The extent of the servant's authority; (3), Power of the servant to delegate his authority; (4), The mode of a servant or agent contracting as such; (5), The effect of declarations by agents or servants as evidence against masters; and (6), The effect of notice to the agent as affecting the principal;

W. C.

1^k. Mode of Creating Authority to Servant to Contract for the Master.

The law prescribes, in general, no particular mode of conferring authority upon a servant or agent. For the most part, it may be either express or implied, by word of mouth or in writing, under seal or not under seal; and subsequent ratification is generally equivalent to previous authority, agreeable to the maxim, "*omnis ratihabitio retrotrahitur et mandato priori equiparatur.*" (Broom's Max. 676; 1 Pars. Cont. 42, &c.; 1 Chit. Cont. (11 Am. ed.) 275, &c.)

W. C.

1^l. Express Authority.

Authority may be conferred *expressly* upon a servant or agent, as we have seen, *in writing or by parol*. Prudence would suggest that it should be in writing always, for the sake alike of the principal, of the agent, and of strangers dealing with the latter as agent; but legally it is not usually necessary, not even in order to make those contracts which are required by statute to be *in writing*; *e. g.*, contracts for the *sale of land*, etc. Even in those cases, although the contract must be in writing, and signed by the party to be charged or *his agent* (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840), yet the authority of the agent may be by parol. There are but two cases where an authority in writing is indispensable, and then it must also be *under seal*—namely, an authority to execute a *sealed instrument*, and to make or to receive *livery of seisin* of a freehold estate in land, it being proper that the authority should be commensurate in solemnity with the act to be done. (2 Th. Co. Lit. 339, & n. (H.); Bac. Abr. Feoffment (H.); Id. Merchant, &c. (B.); 2 Rob. Pr. (2d ed.) 17; Harrison v. Jackson, 7 T. R. 207; Elliott & als. v. Davis, 2 Bos. & Pul. 338; Hibblewhite v. McMorine, 6 M. & W. 200; Williams v. Welsby, 4 Esp. 220; Batty v. Carswell, 1 Am. L. C. 544, &c.; U. S. v. Nelson, 2 Brock. 64; Dair v. U.

States, 16 Wal. 4, 8; *Harrison v. Tiernan*, 4 Rand. 180; *Downer & Co. v. Morrison*, 2 Grat. 237; *Rhea v. Gibson's Ex'or*, 10 Grat. 220; *Ward v. Churn*, 18 Grat. 801; *Preston v. Hull*, 23 Grat. 604 & seq.; *Nash v. Fugate*, 24 Grat. 209 & seq.; *Penn v. Hamlett*, 27 Grat. 340; *Miller v. Fletcher*, 27 Grat. 405 & seq.; *Nash v. Fugate*, 32 Grat. 603, &c.)

2. Implied Authority.

The authority under which the servant acts may be as well implied as express; and the implication may arise from several sources, as (1), from *recognition by the master of similar antecedent acts* of the servant; (2), From the act of the master *in connection with the regular business of the servant or agent*; (3), From the act done being *an essential incident to the power conferred*; and (4), From the *subsequent acquiescence and ratification of the master*:

W. C.

1^m. Authority Implied from the *Recognition by the Master of Similar Antecedent Acts of the Servant*.

Thus, authority to purchase goods, or otherwise to contract debts, is implied to a servant, child, or wife, by the acknowledgment and discharge of similar demands previously arising out of their dealings; and authority to draw or accept bills of exchange by the admission of previous bills, or acceptances made by the same party in the name of the principal. And so an authority is implied to an agent of a corporation to execute the duties of secretary or other officer of the company, from his acting publicly as such, and being so recognized by the association. (*Bac. Abr. Master & S. (K.)*; 1 *Pars. Cont.* 83 and notes; 1 *Chit. Cont.* (11 *Am. ed.*) 287 & seq.; *Hooe & als. v. Oxley*, 1 *Wash.* 19; *Burr's Ex'or v. McDonald*, 3 *Grat.* 235; *Sangston v. Gordon*, 22 *Grat.* 755; *Batty v. Carswell*, 1 *Am. L. C.* 550, &c.)

2^m. Authority Implied from the Act of the Master or Principal *in Connection with the Regular Business of the Servant or Agent*.

Thus, where one sends goods to an auctioneer's sale depository, an authority to sell them may be implied, so far as concerns a *bona fide* purchaser for value; and so a broker in *possession* of stocks or other commodities in which he deals, has an implied power to sell them. (1 *Pars. Cont.* 42; 1 *Chit. Cont.* (11 *Am. ed.*) 277.)

3^m. Authority Implied as an *Essential Incident* to some other Power.

It is an universal principle in law and in politics,

that the grant of any specific power carries with it, by implication, as *incident thereto*, the right to exercise whatever other power may be *necessary and proper* in order to carry the granted power into effect. The maxim alike of law and of common sense is, "*Cuiusque aliquid quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*," whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect. (Broom's Max. 262.) Hence the commandant of a military force, acting for the time independently, whether general-in-chief or subaltern, has power, as incident to his command, to enter into terms of capitulation; the master of a ship, as incident to his function of conducting it out and home, has power to cause needful repairs to be made in a foreign port, and, if occasion requires, to procure another vessel to forward the cargo to its destination; the driver entrusted with a vehicle to convey freight to a market-town, as incident thereto, may cause a wheel to be repaired, or a horse to be shod or doctored, at the charges of the master; the servant of a *salesman*, *e. g.*, of a horse-dealer, employed *daily* in selling horses or other chattels, has, as incident to such *general* power of sale, a power to warrant the title or quality of the things sold; one empowered to sell for cash, has, as incident, the power to receive the purchase-money; the president of a railroad company has, as incident to his office, authority to make contracts for necessary labor for the company, &c. But this implication arises only where there is a close and directly necessary connection between the power actually given and that assumed, so that, without the exercise of the power assumed, the power granted would be nugatory. Thus, my wagoner has, in my absence, an implied power to have a wheel repaired and a horse shod, and may so far charge me, as incident to his power to conduct the wagon to its destination; but his authority does not extend by implication so far as to sell the whole team, because that is in no wise necessary to the object in view. (1 Th. Co. Lit. 641; Id. 234, n. (D.); Broom's Max. 362, 366; Lifford's Case, 9 Co. 52 a; Pomfret v. Ricofft, 1 Saund. 323, and n. (6); Pickering v. Bersh & al., 15 East. 38; Fenn & als. v. Harrison & als., 3 T. R. 761; Yerby v. Grigsby, 9 Leigh, 387; Richmond, F. & P. Rl. Rd. Co. v. Sneed & al., 19 Grat. 354; Scherchardt v. Allens, 1 Wal. 369; Hodge's Ex'or v. First Nat. Bk. 22 Grat. 61.)

4^m. Authority Implied from the *Subsequent Acquiescence and Ratification* of the Master.

Such acquiescence and ratification may be proved by express and direct testimony, but also tacitly, by the master's *voluntary acceptance of the benefit* resulting from the servant's action, or by omitting to repudiate it as soon as it is made known to him. (1 Pars. Cont. 44 & seq.; 1 Chit. Cont. (11 Am. ed.) 290-'91; Downer & Co. v. Morrison, 2 Grat. 237; Bronson's Ex'or v. Chappell, 12 Wal. 681.)

2^k. Extent of Servant's Authority.

The extent of the servant's authority depends on the terms of it. It may embrace all of the master's business of *every kind* (a power seldom conferred), or all, or more or less of a particular class of affairs, or it may be limited to a single transaction. But whether the authority be general or limited, the servant cannot charge the master *if he exceeds it*. He is of course more likely to transcend the bounds of a narrow than of an extended power; but the *principle* in either case is the same. Within his commission, he binds his master; beyond it, he does not. Whilst, then, we must distinguish clearly between a *general agent* and a *special agent*, it is not because there is a diversity in the leading *principle* which determines the master's liability, but merely in order to adjust the actual measure of it. (1 Bl. Com. 429 & seq.; Bac. Abr. Mast. & Ser. (K.); 1 Chit. Cont. (11 Am. ed.) 293, 283; Hopkins v. Blane, 1 Call, 361; Blane v. Proudfit, 3 Call, 207; Hodge v. Combs, 1 Black, 194.)

Where the servant's act exceeds his authority *in degree only*, and not *in kind*, the master may be bound if the servant will personally take upon himself the excess, or if the other will relinquish it; as, for example, in case of an authority to buy land at \$50, and a purchase by the servant or agent at \$51; an authority to insure at 3 per cent., and an insurance effected by the servant at 3½; authority to lease for twenty-one years, and the servant leases for twenty-six. So where the servant *stops short* of his authority, the master will be bound or not according as the servant's conduct tends to attain or to frustrate the *purpose or inducement* of the transaction. Thus, where there is an authority to insure to the amount of \$10,000, and the insurance is effected by the agent for \$5,000; or to buy a farm of 150 acres, and one of 140 is bought, the *purpose and inducement* of the principal are not thwarted by the more circumscribed action of the agent, and the former is bound thereby. But if the agent were empowered to buy a mill and a farm, and he should buy the mill only, or the farm only; or if he were authorized to buy an estate in fee-simple, and were to procure one *for life*, or *for years*, the apparent object of

the principal would be frustrated, and he would not be bound. And so, *a fortiori*, if the agent does a *different thing* from that he was authorized to do, notwithstanding it may be more advantageous, the principal is not bound. Thus where the agent is authorized to buy A's house, and he buys B's at a better bargain; or if, upon being empowered to insure his correspondent's *ship*, he insures not the ship, but the *cargo*, because he has departed from the subject-matter of the instruction, no obligation attaches to the principal. (2 Kent's Com. 619-20; *Alexander v. Alexander*, 2 Ves. Sen. 644; *Campbell v. Leach*, 2 Amb. 740; *Hervey v. Hervey*, 1 Atk. 569.)

A *joint authority* must be executed *jointly*, and a *several authority* must be executed *severally*. Thus, where an authority is given to *S and B* to endorse mercantile paper with the principal's name, an endorsement of his name by *S* only is not binding on the principal. And so joint power from *B, C, A, M, &c.*, to endorse their names, imports a power to make a *joint endorsement*, and does not warrant the endorsing of those names *severally* one after another, because by the law-merchant they would thereby be made liable *severally* and successively, instead of *jointly*, as was designed. (*Union Bank v. Beirne*, 1 Grat. 226; *Bank of U. States v. Beirne*, Id. 234, 271, & seq.; *Bank of U. States v. Beirne*, Id. 539, 546; *Stainback v. Read*, 11 Grat. 281.)

And lastly, it may be observed that, if the authority is wrongfully perverted to subserve the purposes of the agent, the principal will not be liable to any one who colludes with the servant in such perversion. And if a pretended sale be made by the agent without the knowledge and against the known wishes of the principal, to a purchaser aware of the facts, no title passes, and the principal may recover the property. (*Stainback v. Bank of Virginia*, 11 Grat. 269, 281; *Peshine v. Shepperson*, 17 Grat. 472; *Morris & al. v. Terrel*, 2 Rand. 6.)

W. C.

1¹. *General Authority of Servant.*

A general authority confers upon the servant power to transact *all the master's business*, or all of a particular kind, or in a certain locality, and constitutes him what is often called a *general agent*. The power of the general agent being thus defined, it need hardly be stated that no *private instruction* to the agent, circumscribing his power, will avail to shield the master from liability to those who are ignorant of the limitation. Thus, a *horse-dealer* who employs a servant habitually to sell horses for him, is understood thereby to clothe

him with the *incidental power* to warrant both the title and quality. And the power to warrant being thus, by implication, a part of the servant's *general authority*, if in any particular instance he is instructed *privately* not to warrant, the master will, notwithstanding, be liable upon any warranty the servant may make to a purchaser, who is not advised of the secret instruction. (1 Chit. Cont. (11 Am. ed.) 294; 1 Pars. Cont. 39 & seq.; Mann v. King, 6 Munf. 428; Batty v. Carswell, 1 Am. L. C. 544.)

A power of attorney not unfrequently authorizes the agent to "demand, sue for, recover and receive" all debts, or certain debts, due the principal. It should be observed that the agent is not thereby empowered to sue *in his own name* for such debts, having himself no beneficial interest therein, but that the suit, whether at law or in equity, must be instituted in the name of the principal. (Pigott v. Thompson, 3 Bos. & P. 147; Gunn v. Cantine, 10 Johns. (N. Y.) 389; Jones v. Hart, 1 H. & M. 476.)

2^d. Special or Limited Authority of Servant.

A special or limited authority is one which confers upon the servant authority to do only one or a few *special things* about his master's business, and constitutes the servant a *special agent*. Here, as in the case of the general agent, *private instructions* are of no avail to obviate the master's liability for those acts of the servant which are *within the scope of his authority*. The practical difficulty is that, with special agents, the instructions often *accompany* the authority, being conveyed, it may be, in the same sentence; so that considerable embarrassment sometimes ensues in discriminating between instructions and limitations of the power. Thus, if a person who is *not a horse-dealer*, sends his servant, for a single occasion only, to sell a horse, with private instructions, (intended of course *to be kept secret*, and *not communicated*), not to take less than a *minimum* price, the instructions are not designed to be communicated to the other contracting party, and therefore are no part of the servant's commission; and though he disregard them, the sale is notwithstanding obligatory on the master. (1 Pars. Cont. 40, n. (d.); Hatch v. Taylor, 10 N. H. 538.) But where the instructions, though privately given, are given at the same time with the commission, and are of a character which it would not be incongruous to make known (*e. g.*, *not to warrant* a commodity to be sold), they are, or at least will in general be, a *part of the authority*, and the servant's contract in violation of them does not bind the

master. (1 Chit. Cont. (11 Am. ed.) 286-7; East Ind. Co. v. Hensley, 1 Esp. 112; Jordan v. Norton, 4 M. & W. 155; Horton & als. v. Townes, 6 Leigh. 47; Batty v. Carswell, 1 Am. L. C. 544.)

3^d. Power of a Servant to *Delegate his Authority*.

The employment or trust of a servant or agent is for the most part personal, and does or may rest on some ground of individual selection, arising from confidence in the servant's personal ability or integrity, or both. The general doctrine, therefore, especially in agencies involving the exercise of any discretion, is that the authority cannot be delegated: *delegatus non potest delegare*. But this supposes that no power, express or implied, has been given to make the delegation, and that there is no subsequent ratification of the act of the substitute. If, therefore, the business be of a character which requires such delegation (in which case the power to make the delegation is implied), and *a fortiori*, if there be an express permission to delegate, or if the master ratify the substitute's acts, or his appointment, he would be as much bound by the acts of the substitute as by those of the original agent. (1 Pans. Cont. 71-2; Broom's Max. 665-6; 2 Kent's Com. 633, 260; Stor. Agency, §§ 13, 14, 108, 146, 249; Combes' Case, 9 Co. 76 a. and n. (D); Ingram v. Ingram, 2 Atk. 88; Alexander v. Alexander, 2 Ves. Sen. 643; Solly v. Rathbone, 9 M. & S. 300; Cochran v. Irlam, & als., Id. 303.)

4th. The Mode of Making Contracts *by a Servant or Agent Acting as Such*; w. c.

1st. Doctrine at Common Law.

The doctrine at common law is that the contract ought to be so expressed as to show incontestably, that it is *meant* to be the contract of the master through the servant, and not the contract of the servant himself, the *intention* legally exhibited being always allowed to prevail. If it appears that the agent designed to contract in the name and on the behalf of the master, the latter alone is for the most part answerable, and not the agent; whilst on the other hand, if upon the legal construction of the terms, the contract is determined to be the contract of the agent himself, and not of the principal, the latter is not to be charged, but the agent only. Men's intentions are commonly signified by language, and, therefore, if the words of promise be the words of the servant, they bind *him*; and they do not bind him the less because he annexes to them the designation of *servant or agent*, which are regarded as merely *designatio personæ*. Thus, such expressions as, "I promise," "I, as agent for P, promise," "I, in behalf of P,

promise," "I promise that P shall," etc., all import a *personal promise*, and the personal obligation of the servant or agent, which is not in the slightest degree obviated by his describing himself as agent or servant (3 Rob. Pr. (2d ed.), 63 & seq.; Stor. Agency, §§ 154, 269, 270, & seq., 155 & seq.; Combe's Case, 9 Co. 76 b; Frontin v. Small, 2 Ld. Raym 1418; Appleton v. Binks, 5 East. 148; Burrel v. Jones & al. 3 B. & Ald. (5 E. C. L.) 74; Kennedy v. Gouveia, 3 Dowl. & Ry. (16 E. C. L.) 503; Taft v. Biewstet, 9 Johns. 334 5; Duval v. Craig, 2 Wheat. 45; McWilliams v. Willis, 1 Wash. 202; Early v. Wilkinson & al., 9 Grat. 68). But see 1 Am. L. C. 604; Whitney v. Wyman, 11 Otto (101 U. S.), 395-'6).

W. C.

- 1^m. Where the Contract, *in the Body of it*, is in Terms, in the *Name of the Master or Principal*.

When the body of the contract is *in terms*, in the name of the principal (as it always should be), the *mode of signing* is quite a matter of indifference. It may be either "Principal, by Agent," or, "Agent for Principal." (Jones' Devisees v. Carter, 4 H. & M. 184; Wilks & als. v. Back, 2 East. 142; Stinchcomb v. Marsh, 15 Grat. 209; Smith v. Morse, 9 Wal. 82.)

- 2^m. Where the Contract, *in the Body of it*, employs the Pronouns "I" or "We."

Where the contract, in the body of it, instead of saying "The Principal promises," etc., expresses that "I promise," or "We promise," the *mode of signing* is most material.

If the signature in such case be "Principal by Agent," the personal pronoun is interpreted to refer to the *principal* or *master*, and consequently he alone is answerable; but if it be "Agent for Principal," it interprets the pronoun to refer to the *agent*, and it is then he who promises, and who is accordingly liable. And this liability is *exclusive*, if the promise is *under seal*; and if it be not under seal, is shared with the principal, who may be subjected upon the ground that the contract redounds to his benefit, unless it exceeds the agent's authority, or unless the credit was given *solely and expressly* to the latter. (2 Kent's Com. 621; 3 Rob. Pr. (2d ed.) 60 & seq.; Bac. Abr. Leases, (L.) 10; Id. Authority, (C.); Combe's Case, 9 Co. 76 b; Frontin v. Small, 2 Ld. Raym. 1418; Appleton v. Binks, 5 East. 148; Lessee of Clark & al. v. Courtney, &c. 5 Pet. 349; Hartshorne v. Whittles, 3 Munf. 357; Martin v. Flowers, 8 Leigh, 161-'2. But see Whitney v. Wyman, 11 Otto (101 U. S.), 395-'6.) And even

where the credit is given solely to the servant, if it be in ignorance of who the principal is, although with knowledge that the servant is acting in behalf of another, and much more if without such knowledge, the principal, when discovered, is liable. (Nelson v. Powell, 3 Dougl. 26 E. C. L. 410; Addison v. Gandassequi, 4 Taunt. 579; Paterson &c. v. Gandassequi, 15 East. 62; Thompson v. Davenport, 9 B. & Cr. (17 E. C. L.) 78.) And it is to be observed that parol evidence is admissible, to show who is the principal, when he is undisclosed by the contract (supposing it to be *not under seal*), either in order to have the benefit thereof, or to be charged therewith, but not to *discharge the agent*; for that would be to *alter a writing by parol*, contrary to one of the fundamental rules of evidence. (3 Rob. Pr. (2d ed.) 54-5; 1 Pars. Cont. 48; 2 Smith's L. Ca. 222, notes; Mechanic's Bank v. Bank of Columbia, 6 Wheat. 326; Addison v. Gandassequi, 4 Taunt. 579; Thomson v. Davenport, 9 B. & Cr. (17 E. C. L.) 78; Higgins v. Senior, 8 M. & W. 844; Turner v. Lucas' Ex'or, 13 Grat. 712.)

2ⁱ. Doctrine *by Statute* in Virginia, as to the *Mode of making Contracts*.

The statute applies to *conveyances alone*, and provides that, "if in a *deed* made by one as attorney in fact for another, the *words of conveyance*, or the *signature*, be in the name of the attorney, it shall be as much the principal's deed as if the *words of conveyance* or the *signature* were in the name of the principal by the attorney, if it be manifest on the *face of the deed* that it should be construed to be that of the principal to give effect to *its intent*." (V. C. 1873, ch. 112, § 3; V. C. 1887, ch. 107, § 2416.)

5^k. Effect of *Declarations* made by Agents or Servants as Evidence against Masters.

Declarations made by agents or servants during the progress of the business, *dum ferret opus*, are admissible against the master, but not declarations made at other times. (Smith's Ex'or v. Betty, 11 Grat. 763; Packet Co. v. Clough, 20 Wal. 541; Ins. Co. v. Mahone, 21 Wal. 157; Continental Ins. Co. v. Kasey, 25 Grat. 274; Geo. Home Ins. Co. v. Kinnier, 28 Grat. 107; Va. & Tenn. R. R. Co. 26 Grat. 329, 344; Ins. Co. v. Wilkinson, 13 Wal. 235.)

6^k. Effect of Notice to the Agent, as affecting the Principal.

The notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of

his agency; not only nor chiefly because he is presumed to have communicated the facts to the principal, but also, and principally, because the principal having intrusted the business in question to the agent, the other party has naturally and justly a right to deem his acts and knowledge obligatory upon the principal. But in order that an employer shall thus be affected by notice to the agent, it must have come to the latter in the very transaction, or must clearly appear to have been in his mind whilst engaged in the business in question. (Stor. Agency, § 140; *Le Neve v. Le Neve*, [1 Ambl. 436], 2 Wh. & Tud. L. C. (Pt. I), 139 & seq.; *Warrick v. Warrick*, 3 Atk. 294; *Hiern v. Mill*, 13 Ves. 120; *Fuller v. Bennett*, 2 Hare (24 Eng. Ch.), 394; *Morrison v. Bausemer*, 32 Grat. 229; *Johnson v. Nat. Exch. Bank*, 33 Grat. 486-'7; 1 Stor. Eq. § 408.)

- 2ⁱ. Liability of *Servant* on Contracts made by him on Behalf of his Master; w. c.
 1^k. The General Doctrine.

In general, all contracts made on behalf of the master, by a servant or agent, within the scope of his authority, whether express or implied, bind the master or principal; but the servant or agent is *in no wise liable therefor*. It seems, indeed, that if he has styled himself *agent* in the contract, and has *named his principal*, he is *estopped*, notwithstanding he is himself the *real principal*, afterwards to claim as such; at least unless the other party has *treated him as principal*. (Stor. Agency, §§ 261 & seq.; *Bac. Abr. Mast. & Ser.* (K.); 3 Rob. Pr. (2d ed.) 56; 2 Kent's Com. 630; *Bickerton v. Burrell*, 5 M. & S. 383; *Rayner v. Grote*, 15 M. & W. 359; *Schmaltz v. Avery*, 16 Ad. & El. N. S. (71 E. C. L.) 658 & seq.; Stor. Cont. (Bennett's ed.) § 406, note.)

- 2^k. Exceptions to the General Doctrine.

The exceptions to the general doctrine include the case, (1), Where the contract is in the *servant's own name*; (2), Where there is no principal, or none is disclosed; (3), Where the servant or agent exceeds his authority; and (4), Where the agent or servant is dealing for a foreign principal or master. (3 Rob. Pr. (2d ed.) 50, &c.; *Id.* 71-'2; 1 Pars. Cont. 54 & seq.);

w. c.

- 1^l. Where the Contract is in the *Servant's own Name*;

w. c.

- 1^m. In the Case of *Agents of Government*.

Servants of government are not in general personally liable upon contracts made in that capacity, whether under seal or not under seal, although the engagement be couched in terms which in the case of

agents of private persons would charge them individually. They are responsible *personally* only when they clearly, absolutely and unqualifiedly undertake to be so, and the presumption is always against such undertaking.

This is in part because the resources of government are in general so superior to those of an individual, that in the absence of an explicit and unequivocal undertaking to be *personally answerable*, the credit is reasonably presumed to be given to the government: but the doctrine depends principally on *considerations of policy*, for else no man would accept an office of trust under government. In such posts large contracts must often be made, and if in the inadvertence occasionally occurring with the most guarded persons, from the pressure of business, a government officer were liable in his private fortune, wherever the words of the engagement seemed to be his rather than those of the government, the risks incident to the service would be greater than the most desperate place-hunter, who had anything to lose, could afford to take. (Bac. Abr. Master & Ser. (L.); 3 Rob. Pr. (2d ed.) 55; Stor. Agency, §§ 302 & seq.; Mackbeth v. Haldiman, 1 T. R. 172, 182; Unwin v. Wolseley, 1 T. R. 678; Rice v. Chute, 1 East. 519; Syme v. Butler, 1 Call. 105; Tutt v. Lewis' Ex'ors, 3 Call. 233; Hodgson v. Dexter, 1 Cr. 345; Parks v. Ross, 11 How. 374; Simonds v. Heard [23 Pick. (N. Law), 120], 34 Am. Dec. 42; Miller v. Ford [1 Richards. Law (S. C.) 376] 55 Am. Dec. 691 2 & note; Brown v. Austin, 1 Mass. 208; Walker v. Swartwout, 12 Johns. (N. Y.) 444.

2^m. In the Case of Agents of Private Persons; w. c.

1ⁿ. Where the Servant's Undertaking is *Under Seal*.

Where the servant or agent contracts *under seal*, not in the name of his master, but *in his own name*, although he states it to be on the part or behalf of, or as agent for, another, he is, as we have seen, *personally bound*. So, also, it is when he contracts in the same way, although it be as president, director, or member of a committee of an association, incorporated or otherwise. And even in the case of a government servant, where he *clearly intends it*, he is personally responsible. (Appleton v. Binks, 5 East. 148; Combe's Case, 9 Co. 76 b.; 3 Rob. Pr. (2d ed.) 60; *Ante*, pp. 231 & seq.; Stor. Agency, §§ 147, 148 & seq.)

2ⁿ. Where the Servant's Undertaking is *not Under Seal*.

If in a *written contract*, not under seal, the servant uses language whose legal effect is to charge him personally, he is liable accordingly, and he cannot

exonerate himself by extrinsic proof that his purpose was to contract on behalf of his *principal exclusively*, and not to bind himself, and that the other party knew it. That would contravene the established rule of evidence which forbids that any writing shall be contradicted or its effect altered by parol evidence. But whether the legal effect of the language of the instrument is to charge him or not, is a question of construction, which must be resolved in each case on its particular phraseology. The *intention* of the parties is the guiding star, and that must be collected from the instrument itself, by a reasonable exposition of its contents. (3 Rob. Pr. (2d ed.) 62; 1 Pars. Cont. 54, & n. (a); Burrell v. Jones, 3 B. & Ald. (5 E. C. L.) 47; Iveson v. Connington, 1 B. & Cr. (8 E. C. L.) 160; Spittle v. Lavender, 2 Brod. & B. (6 E. C. L.) 453; Norton v. Herron, 1 Carr. & P. (11 E. C. L.) 648; Tanner v. Christian, 4 El. & Bl. (82 E. C. L.) 591; Drake v. Beckham, 11 M. & W. 315; Early v. Wilkinson, 9 Grat. 68. But see Whitney v. Wyman, 11 Otto (101 U. S.), 395-6.)

But whilst parol testimony is inadmissible in order to *discharge* the servant or agent who has thus contracted in his own name, it is allowed (on the same principle as against a *dormant partner*), in order to charge a principal who was unknown to the other contracting party at the time of the contract; for if he were then known, and the contract were still in terms with the agent, it is proof that the credit was given to the latter alone. Such evidence, it will be observed, does not *alter the contract* as to the agent. It shows only that another is bound *as well as he*. (3 Rob. Pr. (2d ed.) 54; Higgins v. Senior, 8 M. & W. 844; Townes v. Lucas' Ex'or, 13 Grat. 710; *Ante*, p. 233.)

2^l. Where there is no *Principal*, or *None is Disclosed*.

In this case the servant or agent is liable personally, although the master or principal, if there be one, may also be subjected, when he is discovered, supposing the contract to be *not under seal*. To this class of cases belong contracts by an agent for an *unincorporated association*, such as a jockey-club. Such an association has, as a body, no existence in law, and it is not supposed that credit was given to the several members individually, numerous, dispersed, and often unknown. (1 Pars. Cont. 55-6; Stor. Agency, §§ 266, 267 & seq.; Thompson v. Davenport, 2 Smith's L. C. 222, note; Cullen v. Duke of Queensberry, 1 Bro. C. C. 101, and n. †; McWilliams v. Willis, 1 Wash. 201; Presbyterian

Church v. Manson & als., 4 Rand. 198; Lyons v. Miller, 6 Grt. 427.)

This class of cases, in respect to the liability of the agent, may be *resolved into three*, namely:

1st. Where the agent makes a *fraudulent* misrepresentation of his authority, designing to deceive;

2d. Where he *knows he has no authority*, but nevertheless enters into the contract as if he had; and

3d. Where not, in fact, having authority, he *bona fide* believes that he has, and makes the contract under that belief.

In all these cases the agent is, it seems, *personally* liable; in the last, because, as the loss must fall somewhere, it should rather rest on him who has assumed, however innocently, yet falsely, that he possessed authority, and thereby occasioned the mischief. (1 Pars. Cont. 56, and n. c; Smout v. Ilberry, 10 M. & W. 9.)

On the other hand, the undisclosed principal, when the contract is *not under seal*, may come forward and claim the benefit of his agent's transactions in his behalf, yet not so as to interfere with any equities which may have arisen between the agent and a third person, before the former was known to be merely an agent. (3 Rob. Pr. (2d ed.) 34 & seq.; Sargent v. Morris, 3 B. & Ald. (5 E. C. L.) 277; Skinner v. Stocks, 4 B. & Ald. (6 E. C. L.) 437; Cothay v. Fennell, 10 B. & Cr. (21 E. C. L.) 671; Phelps v. Prother, 7 J. Scott (81 E. C. L.) 394; Robson v. Drummond, 2 B. & Ald. (22 E. C. L.) 303; Sims v. Bond, 5 B. & Ald. (27 E. C. L.) 393.) And where one has contracted in express terms as principal, to allow another person to claim the benefit of the contract as *principal* is inadmissible, supposing the contract to be *in writing*, because it would be to allow parol evidence to vary a written instrument. (1 Greenl. Ev. § 281; Graves v. Boston Mar. Ins. Co. 2 Cr. 419; Lucas v. De La Cour, 1 M. & S. 249; Humble v. Hunter, 12 Ad. & El. N. S. (64 E. C. L.) 315 & seq.)

3^d. Where the Servant or Agent *Exceeds his Authority*.

Where the servant or agent exceeds his authority, the master or principal, as we have seen, is in general not liable, and *the servant or agent is*. Indeed, the master, where the authority is not substantially pursued, is never liable for the promise as made by the servant; although of course he may become answerable in consequence of his subsequent actual or implied ratification; but it should be observed that such subsequent ratification in no wise *exonerates the servant*. (1 Pars. Cont. 54 & seq.; Stor. Agency, §§ 264, 264 a, 265 & seq.; 1 Tuck. Com. 90, B. I.; Rossiter v. Rossiter, 8

Wend. (N. Y.) 494; Palmer v. Stephens, 1 Den. (N. Y.) 471.) But see Stor. Agency, § 251; Smith Merc. Law, 174, 156.

It is a question in these cases, as well as in those arising under the preceding head (2¹), how the agent or servant is to be charged; whether on the *contract*, which he has professed to make *as agent*, or for the *deceit* practiced by him in falsely pretending an authority which he did not in truth have; or upon an *implied undertaking* that he was really possessed of the power which he exercised. The better opinion seems to be that the *contract is void*;—not binding on the *principal*, because he gave no authority, nor on the *agent*, because he made no promise *for himself*;—and that the agent must either be charged in a *special action on the case for the deceit*, alleging and proving the *scienter* (that is, his *knowledge* that he had no authority); or else, and better, in an action of trespass on the case in *assumpsit* upon an *implied contract* that he was clothed with power to do the act in question. (*Post*, p. 248; 3 Rob. Pr. 71-2; 1 Pars. Cont. 58; Stor. Agency, §§ 264, 264 a, & seq.; Id. 264 and n. 1; Polhill v. Walter, 3 B. & Ald. (23 E. C. L.) 114; Jenkins v. Hutchinson, 13 Ad. & El. N. S. (66 E. C. L.) 751; Lewis v. Nicholson, 18 Ad. & El. N. S. (83 E. C. L.) 511; Rondall v. Trimen, 18 Com. B. (86 E. C. L.) 793-4; Thompson v. Bond, 1 Campb. 6, 7; Salem M. D. Corp. v. Ropes, 9 Pick. (Mass.) 187, (19 Am. Dec. 365).)

4¹. Where the Agent or Servant is Dealing for a *Foreign Principal or Master*.

It seems that it is, in every case, a question of *intention*, to be gathered from the contract itself, and the surrounding circumstances, whether the agent of a foreign principal is personally liable or not. There is no *rule of law* that he shall be so liable. The fact that the principal is a *foreigner* is of some weight in a doubtful case, to determine to whom *credit was given*; but the ultimate question is, did the agent design to bind himself, or to bind his principal alone? and if the contract be *in writing*, that question must be resolved mainly *by its terms*. (3 Rob. Pr. 59; Stor. Agency, § 268; 2 Kent's Com. (12 ed.) 630-31, & n. (a) and 1; Mahony v. Kekulé 14 Com. B. (78 E. C. L.) 396; Green v. Kopke, 18 Com. B. (86 E. C. L.) 558; Lennard v. Robinson, 5 El. & Bl. (85 E. C. L.) 130.)

2^h. *Rights of Master and Servant, respectively, in Respect to Contracts made by the Servant, as such; w. c.*

1ⁱ. *Rights of Master in Relation to Contracts made by Servant, as such; w. c.*

1^k. Rights of Master, where the Contract is *by Deed*.

No advantage at common law can be taken by the master, *in a court of law*, of a contract *under seal*, made by his servant in his behalf, unless he is expressly a *party thereto*. So that, if the servant thus contracts, although professedly for the master's benefit, but without naming him *as a party*, the action *at law* can be maintained only in the servant's name, and not in that of the master. The latter's only remedy, if he has any at all, is in the *court of equity*. (1 Pars. Cont. 53; Ross v. Milne & ux, 12 Leigh, 204.) But in Virginia it is now provided by statute, that if "a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain *in his own name* any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." (V. C. 1873, ch. 112, § 2; V. C. 1887, ch. 107, § 2415.)

2^k. Rights of the Master where the Contract is *not by Deed*.

Where the contract is *not by deed*, an undisclosed principal may claim and enforce the benefit of the contract; save only that he shall not impair nor injuriously affect any equities or rights acquired by the other contracting party in respect to the agent, without notice, and in ignorance that he was merely an agent. (1 Pars. Cont. 53; Warner &c. v. McKay, 1 M. & W. 591, 600; Seins v. Bond, 5 B. & Ald. (27 E. C. L.) 389; Rabone v. Williams, 7 T. R. 360, n. (a); Stracy &c. v. Deey, 7 T. R. 361, n. (c); George v. Clagett, 7 T. R. 359.)

2^l. Rights of *Servant* in Relation to Contracts made with Him as such.

When the servant has contracted *in his own name* he may sue thereon, as the unnamed master may likewise (1 Pars. Cont. 53; 3 Rob. Pr. (2d ed.) 34 & seq.); but if in a contract he styles himself *agent*, and names his principal, he is *estopped* afterwards, as we have seen, to claim as principal in the transaction, notwithstanding he may be really such; at least, unless the other party has treated him as principal. (*Ante*, p. 234; Bickerton v. Burrell, 5 M. & S. 383; Raynor v. Grote, 15 M. & W. 359.)

2^m. Doctrine touching *Torts* committed by Servants in Connection with their Employment.

We must observe, (1), The liability of a master for torts committed by a servant in connection with his employment; and (2), The liability of servants for torts committed by them in the course of their employment;

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1^b. Liability of a *Master* for Torts committed by a Servant in Connection with his Employment.

The general principle is that a master is responsible for the *tortious* acts of his servants which were *done in his service*. (1 Bl. Com. 431; 1 Pars. Cont. 87; Stor. Agency, § 308, 452 & seq.; *Laugher v. Pointer*, 5 B. & Cr. (12 E. C. L.) 547);

w. c.

1ⁱ. Grounds and Limits of the Master's Liability.

The *grounds* of the master's liability are that he may and ought to *control his servants or agents, whom he selects and may discharge*; and that the policy of society requires that he should be answerable for their tortious acts whilst in his employment, and thus subject to his authority. And his liability is *limited* by similar considerations. Hence, while the master is answerable for the *fraud, negligence, and want of skill* of the servants who are engaged about his business, he is not liable for their *wilful and malicious* trespasses which he did not authorize, or afterwards sanction; save in the case of *carriers and innkeepers*, who, from peculiar considerations of public policy, are responsible as *insurers* of the chattels committed to them, for even the *wilful torts* of their servants. Hence, also, he is not liable for the acts or omissions of a *contractor or sub-contractor*, unless the act to be done be itself unlawful, or necessarily involve in its performance what is unlawful, or what imminently endangers the commission of *what is unlawful*, as, for example, the commission of a nuisance. (1 Bl. Com. 431, & n. (26); 1 Pars. Cont. 87 & seq., and n. (aa); *Id.* 89 & seq.; *Quarman v. Burnett*, 6 M. & W. 499; *Rapson v. Cubitt*, 9 Id. 710; *Milligan v. Wedge*, 12 Ad. & El. (40 E. C. L.) 737; *Overton v. Freeman*, 11 Com. B. (73 E. C. L.) 867; *Ellis v. Sheffield Gas Co.* 2 El. & Bl. (75 E. C. L.) 767; *Limpres v. Lond. Gen. Omnibus Co.* 1 H. & C. 526; *Chicago v. Robbins*, 4 Black, 418, 428; *Robbins v. Chicago*, 4 Wal. 657, 679; *Water Co. v. Ware*, 16 Wal. 576-7.)

2ⁱ. Various Instances of Torts by Servants; w. c.

1^k. Torts by *Deceit or fraud* of the Servant.

The master is, in general, liable in an action *ex contractu*, but not in an action of *tort*, for any fraud or deceit practiced by his servant or agent touching his business, although he knew not of it, nor was in any wise actually privy thereto; for as somebody must be a loser by it, it is fitting that it should be he who had the selection of the agent, and who reposed the confidence. Thus a purchaser who has suffered by the deceit or fraud of the agent of the vendor, may upon that ground cancel the contract of purchase, supposing that he can put the

vendor *in statu quo*, or if the purchase has not been consummated, he may resist an action to enforce it, the principal being allowed to retain no benefit which he has obtained through the fraud of his agent. But if, instead of seeking to set aside the contract, the purchaser prefers to bring an action for damages, it must be instituted against the *agent only*, and cannot be maintained against the *innocent principal*. Where, however, the principal knowingly accepts the benefit of the agent's act, he is always liable therefor, as if he had previously authorized it. (1 Pars. Cont. 62-3; Stor. Agency, § 139 and note; *Hern v. Nicholas*, 1 Salk. 289; *Granmar v. Nixon*, 1 Str. 653; *Crump v. U. S. Mining Co.* 7 Grat. 353, *Harvey's Adm'r v. Steptoe's Adm'r*, 17 Grat. 303; *Grim v. Byrd*, 32 Grat. 300; *Veazie v. Williams*, 8 How. 153 & seq.; *Udell v. Atherton*, 7 Hurlst. & N. 172; *Benj. Sales*, 347 & seq.)

2^k. Torts Effected by the Servant or Agent *otherwise than by Fraud or Deceit*; w. c.

1^l. Injuries Arising from the Servant's *Ignorance, Unskilfulness or Neglect*.

The master is always answerable for the damages sustained by third persons, in consequence of the ignorance, unskilfulness or neglect of his servant, in the course of his employment, and although the act or default were without the master's knowledge, or even in despite of *his express orders*. (1 Bl. Com. 431, and n. (26); *Bac. Abr. Master & Ser. (K.)*; 1 Pars. Cont. 87, n. (aa.); *Stor. Agency*, § 452-456; *Phil. & R. R'l R'd Co. v. Derby*, 14 How. 486.)

But it is sometimes an embarrassing question, *who is the master?*—that is, who has the *control* of the servant at the time when the tort occurs? The servant cannot be at once in the employment and under the control of different and unconnected parties, *in the same particular*, but he may be in some respects the servant of one person, and at the same time, in other respects, the servant of another. Thus, where the owner of a carriage hired horses for a day of a stable-keeper, who also provided a driver, and by the negligence of the driver an injury was done to a third person, it was held that the stable-keeper was the driver's master, and, therefore, answerable, and not the owner of the carriage. (*Stor. Agency*, § 453 a & seq.; *Laugher v. Pointer*, 5 B. & Cr. (12 E. C. L.) 547; *Quarman v. Burnett & al.*, 6 M. & W. 508.)

2^l. Injuries Arising from the *Wilful and Malicious Conduct of Servants*.

The master is not in general answerable for the *wil-*
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ful and malicious torts of his servants, even though perpetrated whilst they are engaged about his business, because such torts cannot fairly be said to be *committed in his service*, nor has he that *power of control* with respect to such conduct, which, as we have seen, is the ground of his liability in all cases. (1 Pars. Cont. 87, and n. (aa); Stor. Agency, § 318; *McManus v. Crickett*, 1 East. 106; *Croft & al. v. Alison*, 4 B. & Ald. (6 E. C. L.) 590; *Lyons v. Martin*, 8 Ad. & El. (35 E. C. L.) 212; *Harris v. Nicholas*, 5 Munf. 483.)

To the general proposition that a principal is not liable for the wilful and malicious torts of his servant or agent, but two exceptions are now recalled, namely, in the case of *carriers and of inn-keepers*; who, as we have seen, are, from considerations of public policy, liable for all losses of and injuries to chattels committed to their charge in those capacities respectively, howsoever the loss or injury may have happened, unless it arose directly from an act of God, of a public enemy, or of the owner of the goods; and in the instance of the inn-keeper, with two or three exceptions besides; and, therefore, are answerable even for wilful trespasses done to the chattels by their servants. (1 Pars. Cont. 87, n. (aa); Stor. Bailments, §§ 470, 507, 510.)

3^d. Torts Arising to Servant from *Neglect, Unskilfulness, or Ignorance of a Fellow-Servant.*

A servant cannot subject the master for injuries occasioned by the neglect, unskilfulness, or ignorance of a *fellow-servant* employed about the same work, and in the same department of work, provided the sufferer be *actually engaged in the master's service*, and transacting his business, at the precise time when the injury is inflicted; and provided also, the master has used due precaution in employing *competent persons* to serve him, and also in the appliances to be employed. (Stor. Agency, §§ 453 d; 423 f; *Pierce on R. Roads*, 358 & seq.; *Priestly v. Fowler*, 3 M. & W. 1; *Hutchinson v. Railway Co.* 5 Excheq. 351; *Wigmore v. Jay*, Id. 351; 1 Am. L. C. 620; *Union Pac. R. R. Co. v. Fort*, 17 Wal. 557; *Packet Co. v. McCue*, Id. 513; *Ante*, pp. 217-'18; *Moon v. R. & A. R. R. Co.* 78 Va. 749, 750, 751, 752; *Clark v. Holmes*, 7 H. & Norm. 937; *Ford v. Fitchburg R. R. Co.* 110 Mass. 241; *Hough v. R. R. Co.* 100 U. S. 213, 218-'19; *Wabash R. Way Co. v. McDaniels*, 107 U. S. 459; *Clark v. R. & D. R. R. Co.* 78 Va. 717-'18.)

If the master is supposed to be liable in such a case, in consequence of his having retained incompetent servants in his employment, the declaration should be a

special one founded on that negligence. (*Wigmore v. Jay*, 5 Excheq. 358, n.)

This doctrine, which seems not to have the unreserved approval of the supreme court of the United States, proceeds on the theory that the servant, in entering the employment of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. (*Hutchinson v. Railway Co.*, 5 Excheq. 351-2; *Union Pac. R. R. Co. v. Fort*, 17 Wal. 557.)

Of late a disposition has been manifested to place the immunity of the master from liability for injury resulting to the sufferer from the default of a fellow-servant upon a more rational ground than that originally assumed, namely, that the person injured in entering the employment of the master *must be presumed to have taken upon himself the risks* incident thereto, and amongst them, the negligence of fellow-servants in the same employment. The principle is now said to apply only where the person injured and his fellow-servant were so co-operating at the time of the injury in the business in hand, or their usual duties so brought them into relations of personal association, that they had the power of mutually influencing one another to the exercise of constant caution by counsel, exhortation and example, or by reporting delinquencies to the master. And in applying this rule, a railroad company was held liable to a track-repairer who was injured by a fireman's careless throwing of a lump of coal from a train. (*Pierce on Railroads*, 363; *Cool. Torts*, 541.)

Abundant illustrations of *common service* within the rule which exempts the employer from liability to one servant for injuries caused by the negligence of another, may be seen in *Pierce on Railroads*, 363 & seq.; *Shearm. & Redf. on Negligence*, §§ 109 & seq.; *Cool. Torts*, 544, & n. 1.

2^h. Liability of *Servants* for Torts Committed by Them in the Course of their Employment; w. c.

1ⁱ. Liability of Servants to *Strangers*.

Where the servant, whilst in his master's employment, commits a *tort* against a stranger, he is himself personally answerable therefor, as the master also is, unless the tort be *wilful or malicious*, in which case the master is excused, as we have seen, because, *constructively*, the servant (as to the act complained of) was not *in his service*, nor subject to his control. (*Bac. Abr. Master &*

Ser. (L.); *Hutchinson v. Railway Co.* 5 Excheq. 350; Stor. Agency, §§ 309 & seq.)

It is *said* that the servant is not answerable to strangers for injuries resulting from his *fraud or deceit* in his master's behalf, or from *ignorance, unskilfulness*, or neglect in the course of his employment, for all which, according to this doctrine, the master alone is responsible. (Bac. Abr. Master & Ser. (C. L.); 1 Bl. Com. 431, n. (24); Stor. Agency, §§ 308, 309 and seq.) This may be true enough where the servant, if charged at all, must be charged upon the ground of *contract*; for there is in such cases no contract with the *servant*, either express or implied. But where the servant may be sued as for a *tort*, it would seem that he must be personally liable in all the cases named, because, although the *stranger* may treat the act of the servant as the act of the master, the servant himself, whose default is the cause of the wrong, cannot pretend to do so, and he must, therefore, stand chargeable with whatever injury has resulted therefrom. (*Hutchinson v. Railway Co.* 5 Excheq. 350.)

2ⁱ. Liability of Servants *to the Master*.

The servant is not only liable to the Master for all injuries proceeding directly from his malfeasance and non-feasance, but also for all losses which the master may sustain by recoveries had from him on account of the default of the servant towards others; *e. g.*, by his false and fraudulent conduct, or by his ignorance, neglect, or unskilfulness. (Bac. Abr. Master & Ser. (M.); 1 Stor. Agency, §§ 217 c. & seq.)

3^e. Doctrine touching the Servant or Agent *Dealing for his own benefit* with the Subject of the Agency.

It is in no case admissible for an agent or servant to deal *for his own benefit* with the subject of the agency. Such dealing would afford so many opportunities to deceive and defraud the master or principal, and would offer such temptations to the servant or agent, that, upon considerations of policy, it is inhibited altogether, and such transactions, however fair they may in fact be, are pronounced *constructively* fraudulent, and therefore voidable at the instance of the principal. Hence an agent to *sell property* cannot buy it for himself, nor can an agent *to buy*, purchase what belongs to himself. If this rule be violated, the transaction, at the instance of the principal, will be annulled, unless, with a full knowledge of all the circumstances, he has subsequently ratified it; whilst it is binding upon the agent, if the principal chooses to enforce it. Nor do third persons who acquire an interest in the transaction, from the agent, with notice, or with the means of knowledge, of the agent's violation of duty, stand in a better situation than the agent him-

self. The principal has the option, as to them also, of invalidating the transaction. It should be observed, however, that when the principal elects to annul what the agent has done, he must repay him whatever sums of money he has disbursed on account of the business. (1 Pars. Cont. 75 '6; Stor. Agency, §§ 210-215; 1 Stor. Eq. §§ 315-320; Fox v. Mackreth, 1 Wh. & Tud. L. C. 125 to 169; Morris & al. v. Terrell, 2 Rand; 6; Moseley's Adm'r v. Buck & al. 3 Munf. 232; Buckles v. Lafferty's Legatees, 2 Rob. 292; Segar v. Edwards & ux. 11 Leigh, 213; Bailey's Adm'r v. Robinson, 1 Grat. 4, 9; Wellford v. Chancellor, 5 Grat. 39; Stainback v. Bank of Va. 11 Grat. 269; Same v. Read & Co. 11 Do. 281; Hunter v. Lawrence's Adm'r, 11 Grat. 111; Howery v. Helms, 20 Grat. 7.)

This rule does not apply to mere *formal trustees*, who have no active functions to perform, but are simply passive, such as trustees to preserve contingent remainders. (1 Wh. & Tud. L. C. 151; Parks v. White, 11 Ves. 209, 226); nor does it preclude an agent or trustee from purchasing the subject of the trust or agency at public auction, with the consent of the beneficiary, if he is competent to consent, or by permission of a court of equity. This permission the court is seldom reluctant to concede, taking due precautions against abuse, and grants it of course where the fiduciary's bidding (in consequence of his individual private interest being concerned in obtaining the highest price), would promote the great object of securing the most advantageous sale. (1 Wh. & Tud. L. C. 167; Davoux v. Fanning, 2 Johns. Ch. (N. Y.) 252, 261, 262; Dehon v. Rarey, 2 Saund. 61.)

5°. Doctrine touching the Termination of the Relation of *Master and Servant*.

The authority of the servant is terminated, (1), By express revocation; (2), By the servant's renunciation of his authority; (3), By the servant's death, or that of the master; (4), By a change in the condition of the master; (5), By the completion of the business, or by the lapse of the time prescribed for its duration; and (6), By the occurrence of war between the countries to which the principal and the agent respectively belong;

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1°. Termination of Servant's Authority by *Express Revocation*.

All *mere* authorities are in their nature revocable, and cannot be made otherwise by the most express declarations to the contrary. In order to be irrevocable, the authority must be coupled with an interest in the subject to which the agency relates, or must be given by way of contract for a valuable consideration; as, for example, where the authority constitutes a part of a security for money, &c. Hence, after advances made by a factor, the authority given him to sell the

goods of the principal consigned to him, with a view to secure those advances, is not revocable. (2 Kent's Com. 644; 1 Pars. Cont. 58 & seq., and n. (h); Stor. Agency, §§ 463, 476-7; Metcalfe v. Clough, 2 Man & Ry. (17 E. C. L.) 178; Smart v. Sandars, 5 Man. Gr. & Scott. (57 E. C. L.) 918; Hunt v. Rousmanier, 8 Wheat. 201; Brown v. McGrau, 14 Pet. 494; Field v. Farrington & al. 10 Wal. 149.)

But notice of the revocation of authority must be given to the servant or agent, and also to the public, and especially to the persons accustomed to deal with the servant or agent as such; and his *bona fide* acts until he receives such notice, and the *bona fide* transactions of third persons with him as agent, in the absence of notice to such persons, or to the public, through the newspapers or otherwise, will be obligatory upon the master or principal. (2 Kent's Com. 644; 1 Pars. Cont. 59, 60; 1 Tuck. Com. 93, B. I.; Spencer & al. v. Wilson, 4 Munf. 135; Morris v. Terrell, 2 Rand. 6.)

2^d. Termination of Servant's Authority, by his Renunciation thereof.

As the servant's authority is determined by the *master's revocation* of the same, so it may also be determined by the servant's *renunciation of the agency*. Such renunciation may occur before any part of the authority has been executed, or when it is in part accomplished. But in either case, if the agency is founded upon a valuable consideration, the agent, by renouncing it, makes himself liable for the damages which his principal may thereby sustain; whilst if the agency is purely voluntary and gratuitous, the principle will be entitled to no damages where there has been no beginning made of the execution. If, however, the authority was *in part executed*, and then renounced, whereby the principal sustains damage, the agent is answerable therefor, notwithstanding his service was gratuitous, upon the distinction between *non-feasance* and *mis-feasance* in such cases. But in all cases where the agent renounces his agency, he must give notice to the principal; and if he omits it, and damage results, it may give rise, at least if the omission be fraudulent, to a claim for damages, even where the agency is gratuitous. (Stor. Agency, § 478; Stor. Bailm'ts, §§ 202, 164, 165 & seq.; 2 Kent. Com. (12th ed.) 569, 570; Elsee v. Gateward, 5 T. R. 143; Thorne v. Deas, 4 Johns. (N. Y.) 84.)

3^d. Termination of Servant's Authority by *his Death, or that of the Master*.

The death of the servant terminates the agency, of course, because the confidence is a personal one, and cannot be transmitted to the personal representative; and so also it is when the authority is joint to two or more persons and one of them dies, the agency is ended, unless it be expressly stipulated otherwise in the power, or unless the power be

coupled with an interest in the subject-matter, or be founded on a *valuable consideration*. (1 Th. Co. Lit. 738-9; Id. 344; 2 Kent's Com. 643.)

The death of the master terminates the agency, as it terminates, in general, all powers, *instantaneously and absolutely*, without reference to any notice to the agent, or other persons, or the possibility of notice. The only exception is where the power is *coupled with an interest* in the subject-matter. The fact that it is given for a *valuable consideration* constitutes no exception to the general rule; for the act of the agent must ever be done in the *name of the principal* (Combe's Case, 9 Co. 76 b.), and it would be absurd that an act should be done *in the name of a dead man*. (2 Kent's Com. 646; 1 Pars. Cont. 61-2; 2 Th. Co. Lit. 340, 344; Stor. Agency, §§ 488, 489 & seq.; Hunt v. Rousmanier, 8 Wheat. 201; Clayton v. Fawcett's Adm'rs, 2 Leigh, 23; Houston's Adm'r v. Cantril & al., 11 Leigh, 173; Shipman v. Thompson, Willes Rep. 105; Wynne v. Thomas, Id. 565; Watson, &c. v. King, 1 Stark (2 E. C. L.) 421; S. C. 4 Camp. 274; Houston v. Robertson, 6 Taunt. 450; Blades v. Free, Ex'or, 9 B. & Cr. (17 E. C. L.) 167; Smout v. Ilberry, 10 M. & W. 1.)

The death of the master is believed also to determine any contract of service which may have been entered into between him and his servant, unless there were a stipulation, express or implied, to the contrary (2 Chit. Cont. (11 Am. ed.) 841, 842; Farrow v. Wilson, Law Reps. 4 C. P. 744); a proposition which seems to be the necessary sequence of the long-established principle that the *agency* of the servant is immediately terminated by the master's death, for a servant who is in no sense an agent would be an anomaly.

It is obvious that the doctrine that the master's death immediately determines the servant's agency, although it seems to be the logical result of well-established principles, may endanger consequences anything but convenient. Thus, if one constitutes an agent with authority to provide supplies for his family whilst he goes upon a distant voyage, and during his absence he dies in a remote region, so that intelligence of his death is not received for six months, during all which period necessities are furnished the family by order of the agent, according to the doctrine in question the decedent's estate cannot be charged, because the agency was revoked by his death (Blades v. Free, 9 B. & Cr. (17 E. C. L.) 167); and it is certain that the agent cannot be charged personally *upon the contract*, because he made it as *agent only*. (Smout v. Ilberry, 10 M. & W. 10.) The loss, then, must fall, so far as the *contract* is concerned, on the innocent tradesman. The best solution seems to be that, although the agent cannot be subjected upon the *contract* for the price of the

goods furnished, he may be, by a *special action on the case*, for *deceit*, or by an action of trespass on the case *in assumpsit*, on the ground that, having represented himself, however *bona fide*, as the agent, and in that character obtained the goods, he is responsible for the truth of the representation, either as *for a fraud*, constructive, if not actual, or upon an *implied contract* that he was clothed with the requisite authority. (*Ante* pp. 237-8; *Thompson v. Bond*, 1 Campb. 6, 7.) This view is very well sustained by the *reasoning* of the court in *Smout v. Ilberry*, 10 M. & W. 10, in respect to the agent's being liable to an action on the case *for deceit*. It is also in conformity with several of the older cases. Thus, in *Hern v. Nichols*, 1 Salk. 289, Lord Holt held a merchant liable in an action on the case for a deceit, where it appeared that he had sold certain silk as of a particular quality, *bona fide* believing it to be so, upon the *statement of his foreign correspondent*, when it was, in fact, of an inferior description; for, says Lord Holt, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." So, in *Schneider & al. v. Heath*, 3 Campb. 508, a ship was sold "*with all faults*" by a particular description, which turned out almost wholly untrue. The description was prepared by an agent, who did not know the falsity of it, and Mansfield, C. J., held that the sale must be vacated, for that it signified nothing "whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false." And to a like effect was the opinion of Lord Mansfield in *Pawson v. Watson*, Cowp. 788. So Lord Denman, in *Evans v. Collins*, 5 Ad. & El. N. S. (48 E. C. L.) 819, says: "The sufferer is wholly free from blame; but the party who caused the loss, though charged neither with fraud nor negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not *know* to be true; and it is just that he, not the party whom he has misled, should abide the consequences of his misconduct." This judgment, however, was reversed by the Court of Exchequer-Chamber (5 Ad. & El. N. S. (48 E. C. L.) 827); and it must be admitted that the weight of later English authority is decidedly in favor of the proposition that, in order to sustain an action *for a deceit*, the false representation must have been communicated for a *deceitful purpose*, or have been *known to be false*. *Cornfoot v. Fowke*, 6 Excheq. 358; *Meems v. Hayworth & al.* 10 M. & W. 147; *Taylor v. Ashton*, 11 M. & W. 401; *Wilson v. Fuller*, 3 Ad. & El. N. S. (43 E. C. L.) 639; *Collins v. Evans*, 5 Ad. & El. N. S. (48 E. C. L.) 826; *Pasley v.*

Freeman, 3 T. R. 51; Haycraft v. Creasy, 2 East. 92.) The American cases, on the other hand, favor the conclusion that an assertion, as of *one's own knowledge*, of some matter of fact which is not true, whether the person knew anything of the fact or not, renders him equally liable. "Such an averment has all the elements and all the consequences of a fraudulent representation." (1 Stor. Eq. § 193, note; Hazard v. Irvin, 18 Pick. 96, 109; Page & al. v. Bent & als, 2 Mete. 371, 374; Lobdell v. Baker, 1 Id. 193, 201; Ballow v. Talbot, 16 Mass. 461; Stone v. Denny, 4 Mete. 151; Gough v. St. John, 16 Wend. 646; Smith v. Richards, 13 Pet. 26; Crump v. U. S. Mining Co. 7 Grat. 352; Grim v. Byrd, 32 Grat. 300; Linhart v. Foreman, 77 Va. 544; Lowe v. Trundle, 78 Va. 67.) In England, therefore, the action would be trespass on the case in assumpsit, upon the implied undertaking that the supposed agent had a valid authority, whilst with us it might be either an action of assumpsit or an action on the case for the deceit.

4^f. Termination of the Servant's Authority by a *Change in the Condition* of the Master or Principal.

Such a change as determines the power of the principal to control the subject-matter of the agency puts an end to the agent's authority. Prominent amongst these changes are bankruptcy, lunacy, and marriage in case of a female, at common law, all of which extinguish the agency. But in these cases also, as in others, the revocation or determination of the agent's power may be arrested by its being *coupled with an interest* in the subject-matter, or founded on *valuable consideration*, whereby a lien on the subject may be created, even in case of a bankrupt. (2 Kent's Com. 644 '5; Stor. Agency, §§ 481-483; Alloy, &c. v. Hotson, 4 Camp. 326.) And in Virginia, it is probable that, in the case of the marriage of a woman-principal, the marriage does not revoke the authority, since the Married Woman's Law of April 4, 1877, declaring that all the property, real and personal, owned by any woman at the time of her marriage, or acquired afterwards, shall be her separate property, and not subject to the debts and control of her husband. (V. C. 1887, ch. 103, §§ 2284, 2285.)

In case of lunacy, the existence of the lunacy must be established by a *judicial sentence* before it will operate to revoke the power. (2 Kent's Com. 645.)

5^f. Termination of the Servant's Authority by the *Completion of the Business, or by the Lapse of Time* prescribed for its Duration.

A servant or agent with power to sell goods is *functus officio* as soon as the sale is made, and cannot then change the terms so as to bind the principal; and so, whilst his declarations at the *time of sale* are good evidence against

the principal, as we have seen, yet those made afterwards, although during the continuance of the agency, are inadmissible. The agent himself, however, is of course a competent witness to prove the *facts* at any time. (Stor. Agency, § 480; Blackburn v. Scholes, 2 Camp. 343; Helyear v. Hawke, 5 Esp. 74; Pete v. Hage, 5 Esp. 134; Cliquot's Champagne, 3 Wal. 140; Auditor v. Johnson, 1 H. & M. 540; Hunt v. Rousmanier, 8 Wheat. 174; 1 Am. L. C. 567.)

- 6^f. Termination of the Servant's Authority by the *Occurrence of War* between the Countries of which he and the Master are respectively Subjects.

No transactions of trade or commercial intercourse are permitted between the subjects of belligerent States, *without special license*, in consequence of the mischief and abuses to which such intercourse would be liable. Hence war, for the most part, terminates all agencies (unless, perhaps, where they are *coupled with an interest*), and all partnerships; but not so as to preclude the continuance of an agency in the enemy's country in order to collect debts and to preserve property. (Hale v. Wall, 22 Grat. 430; Manhattan Life Ins. Co. v. Warwick, 20 Grat. 637 & seq.; Ward v. Smith, 7 Wal. 447, 452; 1 Pars. Cont. 178; Potts v. Belt, 8 T. R. 548; The Hoop, 1 Rob. Adm. R. 167; Griswold v. Waddington, 16 Johns. 438; Scholefield v. Eichelberger, 7 Pet. 593.) And this principle applies as well to *civil* as to *international* wars. (Billgerry v. Branch & Sons, 19 Grat. 393.)

- 6^e. Doctrine touching the Liability of the Master where *Government* is Concerned; w. c.

- 1^f. Liability of Government for the Tortious Acts and Defaults of its Servants.

The government is bound, like any other principal, by the *contracts* of its agents, but, upon considerations of public policy, is never answerable for their *tortious acts or defaults*. The maxim *respondeat superior* is not applicable in such cases; for if it were liable, it would involve it in all its operations, in endless embarrassments and losses, which would be subversive of the public interests. *Laches* is never imputable to a government as respects individuals. (Stor. Agency, §§ 319 & seq.; Lane v. Cotton, 1 Ld. Raym. 646; Whitefield v. Ld. De Spencer, Cowp. 754, 763; City of Richmond v. Long's Adm'r, 17 Grat. 378; Weightman v. City of Washington, 1 Black, 40; Chicago City v. Robins, 2 Black, 418.)

- 2^f. Liability of Superior Government-Officer for the Act or Default of *Subordinate*.

When the subordinate is himself a *government-officer* (in contradistinction to a *private servant* of the superior), whether nominated by the superior or not, the latter is not responsible for the subordinate's act or default, such subordinate

being not an agent of his, but of the government. Hence the postmaster-general is not liable for losses arising from the act or default of his deputies, nor is a deputy postmaster answerable for the default of an *official assistant*, although appointed by himself. (Stor. Agency, §§ 319 & seq.; Lane v. Cotton, 1 Ld. Raym. 646; Whitworth v. Ld. De Spencer, Cowp. 754; Dunlop v. Monroe, 7 Cr. 242; Wilson v. Peverly, 1 Am. L. C. 621.)

On the other hand, if the subordinate be not a government-officer, but the superior's private servant, the maxim of *respondent superior* applies, and the master is responsible for his acts and defaults. (Wilson v. Peverly, 1 Am. L. C. 621.) Thus, a mail-carrier, being the private agent of the contractor, and not a government-officer, the contractor is liable for any injury sustained by third persons, through the carrier's negligence or default. (Sawyer v. Corse, 17 Grat. 230.)

This distinction is not only logical, seeing that the subordinate, when a *public officer*, is the agent, not of his chief, but of the government, but it is also rendered needful by sound policy, as well as by justice. For who otherwise would consent to take the responsibility of a public office, wherein he must have assistants, and in administering which the largest fortune might be hopelessly wrecked by the acts of persons whose conduct the superior cannot possibly, practically and effectively, supervise and control. Thus is explained the responsibility of the high-sheriff for the default of his deputy (*Ante*, pp. 115-16 5th); for originally the deputy was merely the *principal's servant*, and not a public officer; and the doctrine has been silently retained, notwithstanding the deputy-sheriff is now to some purposes a public officer. (Shepherd v. Lincoln, 17 Wend. 250; Wilson v. Peverly, 1 Am. L. C. 621 '2; White v. Johnson, 1 Wash. 159, &c.)

But whilst the superior *public officer* is not liable for the official delinquency of his *official subordinate*, he is answerable for not properly superintending, and perhaps for *fraudulent* neglect in appointing him. (Dunlop v. Monroe, 7 Cr. 242; Wilson v. Peverly, 1 Am. L. C. 621.)

3^d. Liability of a *Municipal Corporation* for the Acts and Defaults of its Servants.

In the exercise of *private franchises*, which are often bestowed upon municipal corporations, such as towns and counties, those bodies are liable, like any other individual, for the acts and defaults of their servants, even though not appointed *by themselves*. But whilst it is administering the discretionary *governmental* power belonging to it, such a corporation enjoys the exemption of government for responsibility for its own acts, and the acts of its corporate officers. Hence a city corporation is not liable for any defaults of its officers in the management of a *small-pox hospital* established

by the city (*City of Richmond v. Long's Adm'rs*, 17 Grat. 379); nor for the non-feasance of a corporate officer, in omitting to take a bond of a party, as required by the ordinance of the corporation (*Fowle v. Alexandria*, 3 Pet. 398, 409); nor at *common law*, for not removing obstructions from streets, etc., (*City of Providence v. Clapp*, 17 How. 167). But it is liable for the neglect of its agents in connection with *gas-works*, (*Scott v. City of Manchester*, 2 Hurlst. & Norm. 204); or with wharves for the use of which compensation may be demanded (*City of Petersburg v. Applegarth*, 28 Grat. 343; *Pittsburg v. Grier*, 22 Penn. 54); and *by statute*, it may be chargeable with defaults in connection with the repairs of *sea-banks and mounds*, (*Mayor of Lyme Regis v. Henley*, 3 B. & Ald. (23 E. C. L.) 77; or of *bridges*, (*Weightman v. City of Washington*, 1 Black, 39); or of *streets*, (*City of Chicago v. Robbins*, 2 Black, 418), which its *charter* expressly or impliedly obliges it, as an acknowledgment for the privileges conferred, to keep in repair. (1 Am. L. C. 621; *Mayor of Lyme Regis v. Henley*, 3 B. & Ald. (23 E. C. L.) 77; S. C., 2 Clark & Fin. 331; *Water Co. v. Ware*, 16 Wal. 57; 1 Dill. Mun. Corp. §§ 10 & seq.; 2 Do. § 761; *Orme v. City of Richmond*, 79 Va. 89; *Burnham v. City of Boston*, 10 Allen (Mass.) 290.)

A distinction therefore is to be noted, in this particular, between municipal corporations *proper*, such as chartered cities and towns, and *quasi* municipal corporations, such as counties. Municipal corporations *proper* are called into existence either at the direct solicitation, or by the free consent of the persons composing them, for the promotion of their own local advantage and convenience: whilst *quasi* municipal corporations, *e. g.* counties are created by the sovereign power, to serve its own purposes of local administration, and in general without the solicitation, consent or concurrent action of the people who inhabit them. Hence, whilst towns and cities are in general liable for injuries arising from the default of their servants in respect of streets, bridges, sewers, &c., counties are not answerable for similar defaults, in the absence of a statute creating such liability. (1 Dill. Mun. Corp. § 10; 2 Do. §§ 761 & seq.; *Hamilton Co. v. Mighals*, 7 Ohio, 109; *Mower v. Leicester*, 9 Mass. 247; *Treadwell v. Comm'n*, 11 Ohio, 190; *Hedges v. Madison Co.*, 1 Giln. (Ill.) 567; *Freeholders v. Strader*, 3 Ham. (N. J.) 108; *Bray v. Wollingsford*, 20 Conn. 416, 419; *Van Eppes v. Comm'rs*, 25 Ala. 460; *Fowle v. Com. Counc. of Alexandria*, 3 Pet. 409; *Barnes v. Dist. Col.*, 91 U. S. 551; *Burnham v. City of Boston*, 10 Allen (Mass.) 290; *Orme v. City of Richmond*, 79 Va. 89; *Post*, 636-7.)

7^e. Doctrine Touching the Liability of Employer for the Default, etc., of a *Contractor*.

The master is responsible for the acts of his servant, or of a subordinate agent, however remote, done in the course of his employment, because the servant or sub-agent is *under his control*. As an independent contractor is not subject to his control, it follows that the employer is not in general responsible for him, not even though the acts of the contractor, or his servants, amount to a *public nuisance*, or be otherwise illegal, provided the work contracted for is not itself a *nuisance* or otherwise illegal, nor must *necessarily*, in the ordinary mode of doing it, occasion an injury, or an obstruction to a right. (1 Pars. Cont. 89 & seq.; Quarman v. Burnett, 6 M. & Wels. 499; Rapson v. Cubitt, 9 Id. 710; Milligan v. Wedge, 12 Ad. & El. (40 E. C. L.) 737; Reddie v. Railway Co. 4 Excheq. 244, 257; Knight v. Fox, 5 Excheq. 721; Overton v. Freeman, 11 Com. B. (73 E. C. L.) 867; Chicago City v. Robbins, 2 Black. 418, 428; Robbins v. Chicago, 4 Wal. 657, 679; Water Co. v. Ware, 16 Wal. 576, 7; Ellis v. Sheffield Gas Co. 2 El. & Blackb. (75 E. C. L.) 767; Newton v. Ellis, 6 El. & Bl. (85 E. C. L.) 124; Hole v. Railway Co. 6 H. & Norm. 497.) See Virginia Cent. Rl. Rd. Co. v. Sanger, 15 Grat. 241, 2.

8°. Doctrine Touching the Liability of the Owner of Real Property for its Use for Hurtful Purposes.

The responsibility of the owner of real property, when used for hurtful purposes, seems to depend on, and be measured by, his *power of control*. If one let his land *with a nuisance upon it*, or for a purpose which *must result in nuisance*, he is liable for the consequences. Indeed, it may be stated generally, that the proprietor of land is bound to see to it that his property is so used and managed, whether by himself and his own immediate servants, or by contractors and their servants, as to produce no injury to others. (Sly v. Edgely, 6 Esp. 7; Laughier v. Pointer, 5 B. & Cr. (12 E. C. L.) 547; Randleson v. Murray, 8 Ad. & El. (35 E. C. L.) 109; Rapson v. Cubitt, 9 M. & Wels. 713.)

CHAPTER XV.

OF HUSBAND AND WIFE.

2^d. The Relation of Husband and Wife.

In discussing the doctrine connected with the relation of husband and wife, it will be expedient to observe, (1), The definition and character of marriage; (2), The method of contracting marriage; (3), The modes whereby marriage is dissolved; and (4), The legal consequences of marriage;

W. C.

1°. The Definition and Character of Marriage.

Marriage is defined to be a contract in due form of law,

whereby a free man and a free woman mutually engage to live with each other during their joint-lives, in the union which ought to subsist between husband and wife. (Bac. Abr. Marr. & Div. ; Id. (B).)

Husband and wife, in the old law books, are styled, in the law-French dialect, *baron and feme*, and the wife, in the same dialect, is called a *feme covert* (*fœmina co-operta*), as being under the protection and cover of her husband, or perhaps by analogy to the Latin *nupta* (*a nubendo*, i. e., *tegendero*), because she was led to her husband's home *covered with a veil*. Hence her condition during marriage is called *coverture*. (1 Bl. Com. 432, 442, and n. (38).)

The legal existence of the wife is suspended during marriage, or at least is merged in that of her husband ; and upon this principle of an *union of persons* in husband and wife ("they twain shall be one flesh") depend most of the legal rights, duties, and disabilities that belong to either of them by the marriage. (1 Bl. Com. 442.)

The contract of marriage is regarded by the common law as a purely *civil contract*, but as one peculiarly and most intimately affecting the interests of society. Sir James Mackintosh, with great elegance and force, insists that the chief supports of social order are the two institutions of *property* and *marriage* ; *property*, whereby man securely enjoys the fruits of his painstaking labor ; and *marriage*, whereby the society of the sexes is so wisely ordered as to make it "a school of the kind affections, and a fit nursery for the commonwealth." "Almost all the relative duties of human life," says he, "will be found more immediately or remotely to arise out of these two great institutions. They constitute, preserve, and improve society. Upon their gradual improvement depends the progressive civilization of mankind ; on them rests the whole order of social life." (Mackintosh's Essays, 36 ; see also 2 Kent's Com. 75 ; Montesq. Sp. Laws, B. xxvi. c. 13.)

2^e. Method of Contracting Marriage.

The law, whilst it regards the contract of marriage with reverence, yet treats it as it does all other contracts ; holding it to be valid in all cases where the parties are *willing* and *able*, and actually *do contract* with the forms and solemnities required by law, and in those cases only. (1 Bl. Com. 433.)

Let us, therefore, take notice of, (1), The willingness of the parties to contract ; (2), Their ability to contract ; and (3), The actual contract of marriage in due form ;

W. C.

1^f. Willingness of the Parties to Contract ; w. c.

1^g. The general Doctrine.

The controlling maxim is "*Consensus non concubitus nuptias facit*;" that is, marriage is made by free mutual consent, and not by mere cohabitation. (1 Bl. Com. 434.)

2^g. Marriage-brochage Contracts.

Marriage-brochage contracts are contracts entered into with a view to bring about or forward a marriage, *for a reward*, to be therefor paid to the *broker* who undertakes to negotiate it; and of such consequence is it deemed that marriages should proceed always from *free choice*, that all such contracts, whether the security were executed before or after the marriage, are *utterly void*, as being against public policy (and so incapable of confirmation); and a court of equity will decree any bond or other security founded on such a transaction to be given up and cancelled, and in some cases has decreed money actually paid to be refunded. (Bac. Abr. Marr. & Div. (E.) 3; 1 Stor. Eq. §§ 263, &c.)

2^f. Capacity of the Parties to Contract.

In general, all persons are able to contract themselves in marriage, unless they labor under certain disabilities, partial or entire. (1 Bl. Com. 434.) Let us consider, (1), The doctrine in England as to disabilities to contract marriage; and (2), The doctrine in Virginia;
W. C.

1^g. Doctrine in England as to Disabilities to Contract Marriage.

Disabilities to contract marriage are in England either (1), Canonical impediments, rendering the marriage *voidable*; or (2), Legal disabilities, rendering it *ipso facto void*;

W. C.

1^h. Canonical Impediments.

Let us consider, (1), Why they are called canonical impediments; (2), The classes of canonical impediments; and (3), The effect of canonical impediments;

W. C.

1ⁱ. Why they are called *Canonical* Impediments.

They are so-called because they are derived from and determined by the *canon law*. They are styled also *ecclesiastical* impediments, because they were long cognizable in England in the *ecclesiastical courts*. They make the marriage *voidable* only, and *not void*, so that they are properly denominated *impediments*, rather than *disabilities*. The cognizance of the ecclesiastical or church courts in such cases, at common law, is founded partly upon the Romish idea that marriage is a *sacrament*, but chiefly upon the imputed sinfulness of the connection, which it is the duty of the church, through its tribunals, *pro salute animarum* (for the safety of the souls of the parties), to dissolve and put an end to. (1 Bl. Com. 434.)

Since January 11, 1858, the jurisdiction anciently possessed by the ecclesiastical courts exclusively, over matrimonial causes, has (by the Stat. 20 & 21 Vict., c. 85, and

some amendatory acts), been transferred to a new court, called the "*Court for Divorce and Matrimonial Causes.*" (Wms. Pers. Prop. 492.)

2ⁱ. Classes of Canonical Impediments; w. c.

The several classes of canonical impediments are, (1), Pre-contract; (2), Consanguinity, or relationship by blood; (3), Affinity or connection by marriage; and (4), Incurable impotency of body;

w. c.

1^k. Pre-contract.

By *pre-contract* is signified a previous contract of marriage, *per verba de presenti*, without consummation; (e. g., "I do now marry you," or "You and I are now man and wife," &c.); or *per verba de futuro*, (e. g., "I will marry you,") accompanied or followed by *consummation*. In both these cases at common law the ecclesiastical courts were accustomed to compel a celebration of the marriage *in the face of the church*, even though meanwhile one of the parties had contracted a marriage with some one else. If, however, the contract were *per verba de futuro*, without consummation, it seems that the ecclesiastical courts never went further towards coercing the parties to celebrate the marriage *in the face of the church* than to *admonish them* so to do, but without invalidating any intervening marriage. (1 Bl. Com. 439; Bac. Abr. Marr. & Div. (B.); Jac. L. Dict. Marriage; Bunting v. Lepingwell, 4 Co. 29 a, n. (A.); Holt v. Ward, 2 Str. 937.)

But a private contract of marriage, though *per verba de presenti*, and accompanied by consummation, whilst indissoluble by the parties themselves, and at common law affording to either the power of compelling an actual marriage, is not understood, according to the later English cases, in itself to constitute a *full and complete marriage* for all purposes, unless solemnized by a person *in holy orders*; at least not since about the year 1200, when Pope Innocent III. issued a bull requiring it. Thus, without the priest's blessing, the wife by the common law is not entitled to dower, the husband to curtesy, nor the issue to inherit. (Bac. Abr. Marr. & Div. (C.); 2 Bright H. & Wife, 370 & seq., 397-'8 App'x; Dalrymple v. Dalrymple, 2 Hagg. 64 & seq.; Queen v. Millis, 10 Cl. & Fin. 534; Catherwood v. Caslon, 13 Mees. & W. 263.)

The common law, however, upon this subject of pre-contract as an impediment avoiding a subsequent marriage, has been materially changed in England by statute. Thus, by 32 Hen. VIII, c. 38, it is provided that all marriages solemnized in the face of the church, and *consummated*, shall be indissoluble, notwithstanding any

pre-contract not consummated: and although this branch of that statute was repealed by 2 and 3 Edw. VI., c. 23, it was in effect restored again by 26 Geo. II., c. 33, and 4 Geo. IV., c. 76, whereby it is enacted that the ecclesiastical courts shall not compel the celebration of marriage *in facie ecclesie*, by reason of any contract of matrimony, whether *per verba de presenti* or *de futuro*; and thus pre-contract is understood to be in England no longer a cause of avoiding a marriage, but merely a ground for an action for damages against the party in default. (1 Bl. Com. 435; 2 Steph. Com. 281.)

2^k. Consanguinity.

Consanguinity is relationship *by blood*, and, by Statute 5 and 6 Wm. IV., c. 54, is constituted a *legal or civil disability* to marriage. (1 Bl. Com. 434; 2 Steph. Com. 285.) Let us inquire into, (1), The degrees of kindred within which marriage is prohibited; and (2) The reasons (apart from the divine sanction) for the prohibition of marriage between near kindred;

W. C.

1^l. The Degrees of Kindred within which Marriage is Prohibited.

The law of England follows substantially the Levitical law (Levit. xviii. 6, &c.), of which the general scope and design are to forbid marriages between persons related in the ascending and descending line in *infinitum*, and also between collateral relatives to the *third degree* reckoned by the *civil law*; collaterals of the *fourth degree*, that is, first cousins, being the nearest blood relations who are permitted to intermarry, relatives of the half-blood standing in this respect on the same footing as those of the whole blood, and bastards as those who are legitimate. (Bac. Abr. Marr. & Div. (A.); 1 Bl. Com. 435, n's (4) and (5); 2 Burns' Eccles. Law, 441.)

2^l. The Reasons (apart from the Divine Sanction) for the Prohibition of Marriage between near Kindred.

See Bac. Abr. Marr. & Div. (A.); Montesq. Sp. Laws. B. xxvi. c. 14; Grot. de Jur. Bel. &c., B. II., c. 5, § 12 to 14; Synops. Crim. Law, 171.

The reasons resolve themselves into the following, namely: (1), The corruption of manners to which such marriages would tend; (2), The subversion of the natural duties between parents and children; (3), The deterioration of the race, physically and otherwise, likely to ensue from their toleration;

W. C.

1^m. The Corruption of Manners to which such Marriages would Tend.

The necessary intimacy which exists amongst very

near relations, members of the same family, might be expected to fill numberless households with lewdness, if a commerce of love, to be sanctioned by marriage, were authorized between persons so connected. (Bac. Abr. Marr. & Div. (A).)

- 2^m. The Subversion of the Natural Duties between Parents and Children, &c.

Marriages between parents and children shock the universal sense of mankind, as well savage as civilized. Whilst destroying the reverence with which the child should regard the parent, they would introduce jealousies and discords not less fatal to domestic peace than the connection itself would be to domestic purity. And marriages between children and the brothers and sisters of parents are almost as universally condemned by the human race, and would be scarcely less mischievous.

- 3^m. The Deterioration of the Race, Physically and Otherwise, Likely to Ensur from their Toleration.

It is observed that, in brute creatures, in order to improve or even to continue the species, it is needful to *cross the strain*; and where, in the case of human beings, near relations, even of the unprohibited degrees, intermarry for several generations, the deterioration, physically, mentally and morally, is almost always marked, and sometimes frightful. (Bac. Abr. Marr. & Div. (A).)

- 3^k. Affinity.

Affinity means *relationship by marriage*; and, like consanguinity, is by Statute 5 & 6 Wm. IV., c. 54, converted into a *legal or civil disability*. (1 Bl. Com. 434; Steph. Com. 285.)

The degrees of affinity within which marriage is prohibited, are in England (as they are in Leviticus) the same as the degrees of consanguinity. In order to perfect the union of marriage, it is deemed necessary that the husband should take his wife's relations as his own, and so *vice versa*. Thus, the husband can no more marry the wife's sister than his own, and the wife is as much forbidden to marry her husband's nephew as her own. But the husband's blood relations do not stand thus in regard to the wife's blood relations. Hence two brothers are not prohibited to marry two sisters, nor father and son to marry mother and daughter. (1 Bl. Com. 435, n. (5); Bac. Abr. Marr. & Div. (A).)

In Virginia the restrictions upon the marriage of persons connected by *affinity* have been much relaxed—it would seem beyond what a wise policy can commend. Thus, marriage is allowed with the deceased consort's

brother or sister, nephew or niece, with the wife of one's nephew, with the aunt's husband and uncle's wife. (V. C. 1873, ch. 104, §§ 9, 10; V. C. 1887, ch. 100, §§ 2224, 2225.)

4^k. Incurable Impotency of Body.

One principal object of marriage is the procreation of children, and if the *incurable* impotency of either party, existing at the time of marriage, frustrates this expectation, the marriage is voidable, because one important end of the contract cannot be answered. And if, after the marriage has been pronounced void, the party marries another, and has issue, that fact does not invalidate the sentence of divorce, nor the second marriage, for one may be *habilis et inhabilis diversis temporibus*; that is, capable and incapable at different times. It is immaterial whence the impotence proceeds, whether it be congenital, or has arisen from disease or casualty. If, however, it be a natural defect, it is in general more likely to be permanent and incurable. But it must at all events have existed at the *time of the marriage*, and must not be supervenient. Nor is it available if the party soliciting a separation by reason of it, knew of its existence at that time, whether in himself or in the consort. (Bac. Abr. Marr. & Div. (F.); Bury's Case, 5 Co. 98 b, & n. (A).)

3ⁱ. The Effect of the Canonical Impediments.

We are to observe the effect of the canonical impediments, (1), In respect of *divorce*; and (2), In respect of *issue*;

W. C.

1^k. The Effect in respect of Divorce.

The canonical impediments make the marriage *not void*, but *voidable* only, and the avoidance must be by divorce in the *life-time of both parties*, for the ecclesiastical courts (which until recently, for many ages, have had possession of matrimonial causes in England) proceed upon the idea of the *sinfulness* of the connection, and separate the parties *pro salute animarum* (for the safety of their souls); a reason which of course ceases to be applicable when the connection has been dissolved by death. Hence, where a man had married his first wife's sister (a marriage within the prohibited degrees by the English statute), and the Bishop's court was proceeding, after her death, to annul the marriage, and bastardize the issue, the court of king's bench interposed by writ of *prohibition*, and obliged the ecclesiastical court to desist.

But if, during the *life-time of both parties*, a divorce is decreed for any of the existing canonical impediments

(pre-contract being admitted not to be one), it invalidates the marriage *ab initio*, and by logical consequence *bastardizes* the issue. (1 Bl. Com. 434-'5; Elliott v. Gurr, 2 Phillim. (1 Eng. Ec. R.) 16.)

2^k. Effect of the Canonical Impediments, *in respect of Issue*.

If a divorce be decreed for a canonical impediment, during the *life-time of both parties*, as has been just stated, the issue is thereby bastardized; but the spiritual courts, as already explained, will not be permitted to bring about that result by divorce after the death of either. (1 Bl. Com. 435; Harris v. Hicks, 2 Salk. 548.)

2^h. Legal or Civil Disabilities.

These disabilities are created, or at least enforced, by the municipal laws, and are recognized in the temporal courts. Some of them are doubtless grounded on *natural* law, but they are regarded by the laws of the land, not so much as involving any *moral* offence, although one of them does involve it, as on account of the civil inconveniences they draw after them. (1 Bl. Com. 435.) Let us look at, (1), The classes of legal or civil disabilities; and (2), The effect of such disabilities;

W. C.

1ⁱ. The Classes of Legal or Civil Disabilities.

The classes of legal or civil disabilities in England, in the time of Blackstone, were, (1), Prior marriage; (2), Want of age; (3), Want of reason; and (4), Want of consent of parents and guardians;

W. C.

1^k. Prior Marriage.

That is, having another husband or wife living; in which case, besides the penalties consequent upon it as a felonious offence (under the name of *bigamy*, although *polygamy* would be the fitter designation,) the second marriage is to all intents and purposes *absolutely void*, polygamy being condemned both by the law of the New Testament (Matt. xix. 4 to 9; 1 Cor. vii. 4), and by the policy of all prudent States. (Grot. de Jur. Bell. &c., B. II., c. V. 19; 1 Bl. Com. 426.)

2^k. Want of Age.

As want of age avoids (or at least renders voidable) all other contracts, on account of imbecility of judgment in the party contracting, *a fortiori* ought it to avoid, or render voidable, this, the most important contract of any.

The age of consent to actual marriage at common law is *fourteen* in males, and *twelve* in females; and if the parties are under those ages respectively, the marriage is only inchoate, and may be avoided by either of them upon arriving at the age of consent, without any divorce

or sentence of the spiritual court. If, however, upon attaining the age of consent they continue together, they need not be married again.

If one party be of the age of consent, and the other under it, when the latter comes to the proper age, *either* at common law may disagree to the marriage, upon the principle that there must be mutuality of obligation. The doctrine is incontrovertible at common law, in respect to *actual marriage*, but it is in direct conflict with the principle which governs other contracts of infants, including a contract to marry *in futuro*. The general principle is that, whilst an adult is bound by a contract, an infant party thereto may avoid it at his election. (1 Bl. Com. 436; 2 Kent's Com. 78; Holt v. Ward, 2 Str. 937; *Post*, p. 265, 2^d.) And this last-named general principle is now established in Virginia, as to actual marriages, by statute, which enacts that a party who, at the time of marriage, as mentioned in section 2254, (touching marriages where either party is under the age of consent), was capable of consenting with a party not so capable, shall not have power to institute such suit for the purpose of annulling such marriage. (V. C. 1873, ch. 105, § 4; V. C. 1887, ch. 101, § 2255.)

3^k. Want of Reason.

Without a competent share of understanding at the time, neither the matrimonial nor any other contract is valid; but of course it is not liable to be avoided by a *subsequent* privation of reason. There is the same, and no more, difficulty in determining whether there is sufficient intelligence to deal with marriage as in the common affairs of life. Hence, although a marriage with an idiot or lunatic (except in a lucid interval) is at common law *per se* void, without any decree or divorce; yet, for the good of society, as well as for the peace of mind of all concerned, it is expedient and allowed that the nullity of the marriage shall be ascertained by the sentence of a court of competent jurisdiction, which in England was, until 1858, the court ecclesiastical, and since that date has been a secular court created for the purpose, and styled "The Court for Divorce and Matrimonial Causes." (1 Bl. Com. 438; 2 Kent's Com. 76; Bayard v. Morpew, 2 Phill. 321; Portsmouth, v. Portsmouth, 1 Hagg. (3 E. C. L.) 155; *Ante*, p. 255.)

4^k. Want of Consent of Parents and Guardians.

This disability is purely *statutory*. By the common law, if the parties themselves were of the age to consent, there wanted no other concurrence to make the marriage valid; and this was in accordance with the canon law.

The marriage acts in England require the consent of

the parents or guardians, wherever the parties are under twenty-one and not widowed, and the statute 26 Geo. II., c. 33, *avoided the marriage* if such consent were not had. The subsequent statute of 4 Geo. IV., c. 76 is more lenient; and whilst it inflicts penalties for the non-observance of its provisions, it does not invalidate the marriage, being construed to be merely *directory*. Such is understood to be also the effect of the later statutes of 6 & 7 Wm. IV., c. 85; 7 Wm. IV., and 1 Vict. c. 22; and 3 & 4 Vict. c. 72. (1 Bl. Com. 437-8. and n. (17); 2 Steph. Com. 288; Bac. Abr. Marr. & Div. (C.); Rex v. Bramley, 6 T. R. 331; Rex v. Birmingham, 8 B. & Cr. (15 E. C. L.) 29.)

2ⁱ. Effect of Legal or Civil Disabilities; w. c.

1^k. Effect as to the *Marriage*.

The legal disabilities make the marriage void *ab initio* and *per se*, without any sentence of divorce, the connection being esteemed a *meretricious*, and not a *matrimonial* union. However, for the reason already stated (*Ante* p. 261, 3^k), it is allowed, and is expedient to obtain a decree of divorce, judicially ascertaining the facts, and pronouncing the legal consequence. (1 Bl. Com. 436; Bayard v. Morphey, 2 Phillim. (1 Eng. Ec. R.) 321.)

2^k. Effect of the Legal Disability as to the *Issue*.

The issue at common law is bastardized, of course, that being the logical result of the absolute invalidity of the marriage *ab initio*. (1 Bl. Com. 436.)

2^g. Doctrine in Virginia touching the *Capacity to Contract Marriage*.

As in Virginia we have no ecclesiastical courts, it will be expedient to make a classification of incapacities for marriage somewhat different from that found in the English writers, and yet based on the same essential diversity, discriminating, namely, between *impediments*, which render a marriage *voidable*, by the sentence of a court of competent jurisdiction, and *disabilities*, which make it *void* without any judicial sentence whatever. And it should be observed, that whether the marriage be absolutely *void*, or *voidable* only, the issue is with us expressly declared to be *legitimate*. (V. C. 1873, ch. 119, § 7; V. C. 1887, ch. 113, § 2554.)

1^b. *Impediments* which Render a Marriage *Voidable* in Virginia.

We shall find some differences in the enumeration of these impediments from the corresponding canonical class in England. Thus, *pre-contract* not amounting to an actual marriage is understood not to exist with us as an impediment, rendering a subsequent marriage to another voidable, as, indeed, it has ceased to exist as such in the

mother-country (*Ante* pp. 256-7, 1^k), since the statute 26 Geo. II., c. 33 (A. D. 1754). *Want of reason* also, is here classed with the *impediments* instead of with the *disabilities*; and several impediments, which did not exist at common law, have been added in Virginia by statute. (1 Tuck. Com. B. I., p. 94; 2 Steph. Com. 281.)

The impediments which, existing at the time of the marriage, render it *voidable* in Virginia, are six in number, namely: (1), Natural or incurable impotency of body at the time of the marriage; (2), Consanguinity and affinity; (3), Want of reason; (4), Conviction before marriage of an infamous offence, without the knowledge of the other party; (5), Pregnancy of the wife at the time of the marriage, without the husband's knowledge, by some person other than himself; and (6), Prostitution of the wife, prior to the marriage, without the husband's knowledge. (V. C. 1873, ch. 105, §§ 6, 1; *Id.* ch. 104, §§ 9, 10; V. C. 1887, ch. 101, §§ 2257, 2252; *Id.* ch. 100, §§ 2224, 2225.)
W. C.

1ⁱ. Natural or Incurable Impotency of Body, Existing at the Time of Marriage.

The reasons for this doctrine, and the doctrine itself, are the same as at common law. (*Ante* p. 259, 4^k; V. C. 1873, ch. 105, § 6, V. C. 1887, ch. 101 § 2257.)

2ⁱ. Consanguinity and Affinity.

The general principles are the same as in England, with some diversity in the details, especially in cases of *affinity*. (See *Ante* pp. 254.) Thus, it is declared that, if any man have, before 28th March, 1851, married his uncle's widow, or before 15th March, 1860, married his brother's widow, or before 5th February, 1873, married his nephew's widow, the marriage is legal and valid. Nor is there, at present, any prohibition against *a man* marrying his uncle's widow, or his deceased wife's sister, her aunt, or her uncle's widow; nor against *a woman* marrying her deceased aunt's husband, or her deceased husband's brother, his uncle, or his deceased aunt's husband. (V. C. 1873, ch. 104, § 9 to 11; *Id.* ch. 105, § 1; V. C. 1887, ch. 100, §§ 2224 to 2226; *Id.* ch. 101, § 2252.)

It should be observed that, in cases of *affinity*, the prohibition continues in force, notwithstanding the dissolution, by death or divorce, of the marriage out of which the affinity arose, unless the divorce be for a cause which made the marriage originally unlawful and void. (V. C. 1873, ch. 104, § 11; V. C. 1887, ch. 100, § 2226.)

W. C.

1^k. Degrees Prohibited to the *Man*.

A man may not marry his mother, grand-mother, step-mother, sister, daughter, grand-daughter, half-sister,

aunt, son's widow, wife's daughter, or her grand-daughter, or step-daughter, or his niece.

V. C. 1873, ch. 104, § 9 ; V. C. 1887, ch. 100, § 2224.

These provisions, as already observed, do not prohibit the *man* from marrying his uncle's widow, his deceased wife's sister, her aunt, or her uncle's widow.

2^k. Degrees Prohibited *to the Woman*.

A woman may not marry her father, grand-father, step-father, brother, son, grand-son, half-brother, uncle, daughter's husband, husband's son, or his grand-son, or step-son, nephew, or her niece's husband.

V. C. 1883, ch. 104, § 10 ; V. C. 1887, ch. 100, § 2225.

Hence the *woman* is not prohibited from marrying her deceased aunt's husband, or her deceased husband's brother, his uncle, or his deceased aunt's husband.

3ⁱ. Want of Reason.

The principles are the same as those already explained as applicable in England. (See *Ante* p. 261, 3^k ; V. C. 1873, ch. 105, § 1 ; V. C. 1887, § 101, § 2252.)

4ⁱ. Conviction before Marriage of an *Infamous Offence* without the knowledge of the other Party.

V. C. 1873, ch. 105, § 6 ; V. C. 1887, ch. 101, § 2257.

Every felony is an "infamous offence," and so likewise is every instance of the *crimen falsi*, which embraces every offence that at once involves the charge of falsehood, and may also affect the administration of justice ; *e. g.*, perjury, subornation of perjury, suppression of testimony by bribery, conspiracy to accuse one of a crime, or to procure the absence of a witness, and barratry, or stirring up of suits—and perhaps others besides. (1 Greenl. Evid. § 373 ; 1 Phil. Evid. 17 ; 2 Russ. on Cr. 592-3 ; Synops. Crim. Law, 257 ; V. C. 1873, ch. 190, § 3 ; Id. ch. 195, § 19 ; V. C. 1887. ch. 183, § 3743 ; Id. ch. 190, § 3898.)

Surely, to allow a marriage to be invalidated for such very trivial causes as are some, not to say all of these, is hardly to "deem with reverence meet" of that contract on whose sacred observance and steadfast maintenance depend so inseparably the purity and social order of the commonwealth !

5ⁱ. Pregnancy of the Wife, at the Time of the Marriage, without the Husband's Knowledge, by some Person other than the Husband.

V. C. 1873, ch. 105, § 6 ; V. C. 1887, ch. 101, § 2257.

6ⁱ. Prostitution of the Wife prior to the Marriage, without the Knowledge of the Husband.

V. C. 1873, ch. 105, § 6 ; V. C. 1887, ch. 106, § 2257.

2^h. *Disabilities* which in Virginia render the Marriage *void per se*, without any Sentence of Divorce ; w. c.

1ⁱ. Prior Marriage, still Subsisting.

All marriages which are prohibited by law, on account of either of the parties having a former wife or husband then living, shall be *absolutely void*, without any decree of divorce, or other legal process. This supposes, of course, that the former marriage has not been declared void, nor been dissolved by the sentence of a court of competent jurisdiction. (V. C. 1873, ch. 105, § 1; Id. ch. 192, § 2; V. C. 1887, ch. 101, § 2252; Id. ch. 185, § 3782; *Ante*, p. 260, 1^k.)

2ⁱ. Want of Age.

In case of a marriage solemnized when *either* of the parties is under the age of consent (fourteen in males, and twelve in females), if they shall *separate during such non-age, and do not cohabit afterwards*, the marriage shall be deemed void, without any decree of divorce, or other legal process. But a party who, at the time of the marriage, was capable of consenting, with a party not so capable, has not the privilege of invalidating the marriage, although the party under the age of consent may do so, thus conforming to the analogy of other contracts by persons under age, an analogy to which, as we have seen, the common law did not adhere. (V. C. 1873, ch. 105, §§ 3, 4; V. C. 1887, ch. 101, §§ 2254, 2255; *Ante*, p. 260, 2^k.)

3ⁱ. Difference of Race—*one Party White and the other Negro*.

All marriages between a white person and a negro are absolutely void, without any decree of divorce or legal process (V. C. 1873, ch. 105, § 1; V. C. 1887, ch. 101, § 2252), both parties being also punishable by confinement in the penitentiary, from two to five years (V. C. 1887, ch. 185, § 3788). And a negro, or colored person, for they have the same meaning, it will be remembered, is one who has *one fourth or more* of negro blood. (V. C. 1873, ch. 103, § 2; V. C. 1887, ch. 6, § 49; McPherson's Case, 28 Grat. 940; Jones' Case, 80 Va. 544.)

This peremptory prohibition of the mixture of the two races in marriage has been found in the statutes of many, if not all, of these States, and amongst others of *Massachusetts*. (2 Kent's Com. 96, n. b.; Id. 285, n.; Kinney's Case, 30 Grat. 865, 866.) But to the writer it seems that to punish the act as a *felony* is not called for by the necessity of the case, or the practical extent of the mischief, and tends to obscure, in the minds of the people, the grand distinctions between *right and wrong*. To declare such marriages void, and to punish them as misdemeanors, would seem to be as far as it is either expedient or proper for legislation to go, at least until the exigency of the case shall be greater than it is now, or is likely to be.

3^d. Actual Contract of Marriage in Due Form of Law.

Under this head it is proposed to consider, (1), The contract of actual marriage *in presenti*; and (2), The contract to marry *in futuro*;

W. C.

1^g. Contract of Actual Marriage *in presenti*.

Let us consider here, (1), The circumstances necessary to actual marriage at *common law*; (2), The circumstances made necessary to marriage in England *by statute*; (3), The circumstances prescribed by statute in Virginia; (4), The effect of foreign marriages; and (5), The proof to be judicially made of marriage;

W. C.

1^h. The Circumstances Necessary to Actual Marriage at Common Law.

There is a remarkable diversity of opinion as to what is needful *at common law* to constitute an *actual marriage*, valid *for all purposes*. Upon the whole, however, it seems the better opinion in England that the contract must be between parties *free from all impediments and disabilities, per verba de presenti*, and solemnized by a *person in holy orders*. (Bright's H. & Wife, 370 & seq.; 397 & seq.; Bac. Abr. Mar. & Div. (C.); Broom's Max. 381 & seq.; Haydon v. Gould, 1 Salk. 119; Queen v. Millis, 10 Clark & Fin. 534; Dalrymple v. Dalrymple, 2 Hagg. C. R. 64 & seq.; Catherwood v. Caslon, 13 M. & W. 261, 264.)

But although overruled by these cases, there is much authority for the proposition that the common law did not demand the intervention of a person in holy orders, but that a contract to marry *per verba de presenti*, without cohabitation, or *per verba de futuro*, followed by consummation, is by that law as valid a marriage (supposing the parties competent) as if made *in facie ecclesiæ*. (Bunting's Case, 4 Co. 29 a; Jesson v. Collins, 2 Salk. 437; Wignmore's Case, Id. 438; Opinion of Sir Wm. Scott, Dalrymple v. Dalrymple, 2 Hagg. C. R. 67 & seq.; 2 Kent's Com. 87.)

Upon this question the judges of the United States supreme court were equally divided in Jewell's Lessee v. Jewell & al. 1 How. 234; but the doctrine generally held in the American courts is that by the common law a merely civil contract entered into *per verba de presenti*, without any ecclesiastical sanction, or the observance of any particular form, is a good marriage in the absence of any legislative enactments to the contrary. (2 Kent's Com. 87, 91; Catherwood v. Caslon, 13 M. & W. 266, *note*; *Infra* 244; Comm'th v. Stump (53 Penna. 132), 91 Am. Dec. 200, 201; Hutchins v. Hutchins, 31 Mich. 131.)

2^h. The Circumstances made Necessary to Marriage in England by Statute.

See 2 Steph. Com. 286 & seq.; 1 Br. & Hadl. Com. 530 & seq., citing the Statutes 4 Geo. IV. c. 76; 6 & 7 Wm. IV. c. 85; 7 Wm. IV., and 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119.)

3^d. The Circumstances Prescribed by Statute in Virginia.

See V. C. 1873, ch. 104, § 1 to 8; V. C. 1887, ch. 100, §§ 2216 to 2223.

W. C.

1ⁱ. Effect of the Statutes in Abrogating the Common Law.

The *terms* of the statute are peremptory in prescribing that "*every marriage shall be under license, and solemnized in the manner herein provided.*" But when it is considered that there are no express words avoiding the marriage, if not so contracted, and that the omission of the statutory observances is not named amongst the grounds on which a marriage is either void or voidable (V. C. 1873, ch. 105, §§ 1, 3, 6; V. C. 1887, ch. 101, §§ 2252, 2254, 2257), and when it is further considered what unhappy results would follow if the marriage were liable to be avoided by the pretermission of what, after all, is only ceremonial, and not of the essence of the transaction, it would seem best to adopt the sentiment of Grotius (*De Jur. Bel. &c.*, B. II. c. V. § 16), upon another branch of the subject, and regard the provision of the statute as *directory* merely. "Though a merely human law," says he "prohibits the contracting of marriage between particular persons, it will not therefore follow that such a marriage, if it be actually contracted, is void. For *to forbid and to invalidate* are quite different things." Such a construction, it may be added, prevailed in respect to the English statute 4 Geo. IV., c. 76, whose provisions (very similar to those of ours,) were determined to be *merely directory*. (*Rex v. Birmingham*, 8 B. & Cr. (15 E. C. L.) 29; 2 Steph. Com. 288; 1 Tuck. Com. B. I., p. 99.) The doctrine is believed to be now well established, that a marriage valid at common law, is valid notwithstanding the non-observance of the directions prescribed by statute respecting its solemnization, unless the statute *contains express words of nullity*. (1 Bish. Marr. & Div. § 283 and notes; 2 Greenl. Ev., §§ 461, 2; *Parton v. Henning*, 1 Gray (Mass.), 119; *Hutchins v. Kimmell*, 36 Mich. 126; *Meister v. Moore*, 96 U. S. 78 '9 & seq.; *Holmes v. Holmes*, 6 La. 463; S. C., 26 Am. Dec. 482, 484, and note.) And hence a contract of marriage made *per verba de presenti*, and duly proved, is as valid as if made *in facie ecclesie*. (*Fenton v. Reid*, 4 Johns (N. Y.) 52; S. C., 4 Am. Dec. 244; *Jackson v. Winne*, 7 Wend. (N. Y.) 47; S. C., 22 Am. Dec. 563; *Londonderry v. Chester*, 2 N. Hampsh. 268; S. C., 9 Am. Dec. 61; *Newburg v. Brunswick*, 2 Vermt. 151; S. C., 19 Am. Dec. 703; *Taylor v. Swett*, 3 La., 133; S. C., 22 Am. Dec. 157.)

2ⁱ. The Directions of the Statutes of Virginia; w. c.1^k. The Persons to whom the Statute is Applicable.

Previous to February 27, 1866, the marriage laws of Virginia did not contemplate nor include negroes, not even *free negroes*, at least in respect to any penalties for disregard of the laws touching license, or prohibition of bigamy, of incestuous marriages, or of lewd cohabitation; and hence, marriages of free negroes (those of slaves being void) were governed altogether by the common law. (V. C. 1860, ch. 196, § 1 & seq.; V. C. 1873, ch. 192, §§ 1, 3, 5, 7; Id. ch. 103, § 4; V. C. 1887, ch. 185, §§ 3781, 3783, 3785, 3787; Id. ch. 100, § 2227; *Ante*, p. 188, 5.)

By the act of February 27, 1866, all distinction between white persons and negroes, as to the mode of contracting marriage, is obliterated, although, as we have seen, it is still penal for a white person and a negro to intermarry. And it is provided, in order to meet the case of the colored population, especially of that part which had been slaves, that where *colored persons* (which phrase includes free colored persons, as well as slaves,) have cohabited as husband and wife, and were then so cohabiting (27th February, 1866), whether the rites of marriage had been celebrated between them or not, they should be deemed husband and wife, and their children, whether born before the act or after, should be legitimate. And that if they had then ceased to cohabit, the children of the marriage recognized by the man should be deemed legitimate. (V. C. 1873, ch. 103, § 4; V. C. 1887, ch. 100, § 2227; *Francis v. Francis*, 31 Grat. 286-7; *Smith v. Perry*, 80 Va. 563.)

It is not necessary, under this statute, to prove an agreement *in terms*, that the parties will take one another as husband and wife, but the fact of the relations existing may be established by the acts, conduct and conversation of the parties. (*Francis v. Francis*, 31 Grat. 287.)

2^k. The License to Marry.

See V. C. 1873, ch. 104, §§ 1 to 3, 7, 14 to 18; V. C. 1887, ch. 100, §§ 2216 to 2218, 2222, 2228 to 2231; w. c;

1^l. Who shall Issue the License.

The license is to be issued by the clerk of the court of the county or corporation where the female *usually resides*, or if the office of clerk be vacant, by the *judge of the county court*, or the mayor of the corporation, who shall make return to the clerk as soon as there may be one; and the license is to be registered. (V. C. 1873, ch. 104, §§ 1, 2; V. C. 1887, ch. 100, §§ 2216, 2217.)

2. The Consent of the Parent or Guardian.

If either party be under twenty-one years of age, and not before married, the consent of the father or guardian, or if there be none, of the mother, of such person is required, either personally or in writing, subscribed by a witness, who shall make oath before the clerk, or officer issuing the license, that the writing was acknowledged *in his presence* by the parent or guardian. (V. C. 1873, ch. 104, § 3; V. C. 1887, ch. 100, § 2218.)

No provision is made for the parent's being *non compos*; but it is supposed that the method of proceeding in such cases would be for the proper court to appoint a guardian to give the required consent. (V. C. 1873, ch. 123, §§ 3, 4; V. C. 1887, ch. 116, §§ 2599, 2600.)

3. The Statistical Statement to be obtained by the Clerk, and Recorded.

At the time the clerk issues the license, he is to require from the party obtaining it a certificate, setting forth, as near as may be, the *date and place* of the proposed marriage; the *full names* of both parties; their *ages and condition* before marriage (whether single or widowed); the *places of their birth and residence*; the *names of their parents*, and the *occupation* of the husband. (V. C. 1873, ch. 104, § 15; V. C. 1887, ch. 100, §§ 2229, 2230.)

This requirement seems designed principally to afford the means of identifying the parties, if occasion should arise therefor; although some of the facts incorporated thus into the marriage-register may contribute to form a body of useful statistics.

4. The Return of the License by the *Celebrant*.

The minister or other person celebrating a marriage, or the clerk of any religious society which celebrates marriage in open congregation, is required to make and sign a *return*, within two months, showing the solemnization of the marriage, and whether the parties are *white or colored*, which, being recorded by the clerk of the county or corporation court, together with the license and certificate of statistics mentioned above *Supra*, 3^d), constitutes the *Marriage Register*, which is *prima facie* evidence of the facts therein set forth. (V. C. 1873, ch. 104, §§ 14 to 18, 28; V. C. 1887, ch. 100, §§ 2228 to 2231; *Id.* § 2241; Moore's Case, 9 Leigh, 639.)

5. Penalty on the Clerk for Illegally Issuing a License.

Knowingly to issue a license contrary to law, is punished by the clerk's confinement in jail for not more than a year, and a fine not exceeding \$500. (V. C.

1873, ch. 192, § 4; V. C. 1887, ch. 185, § 3784; Hill's Case, 6 Leigh, 636.)

3^k. The *Celebrant*; w. c.

1^l. Who may Celebrate the Rite of Marriage; w. c.

1^m. The Minister of any *Religious* Denomination.

He is not required to be a minister of the *gospel*. A Hebrew or any other minister of *religion* is competent. But he must first produce, before some county or corporation court in the State, proof of his ordination, and of his being in regular communion with his religious society; and he must also give bond, with good security, in the penalty of \$500, when the court will make an order authorizing him to celebrate marriage. (V. C. 1873, ch. 104, § 4; V. C. 1887, ch. 100, § 2219.)

2^m. One or more Residents in any County, by Appointment of the County Court.

The court of any *county*, which deems it expedient, may appoint one or more persons *resident* therein, to celebrate marriage within the same, or any district thereof; and such persons, upon giving bond, as in case of a minister, may exercise the function until the order is rescinded. (V. C. 1873, ch. 104, § 5; V. C. 1887, ch. 100, § 2220.)

3^m. The Persons prescribed by any Religious Society which has no *Ordained Minister*.

The marriage may in such case be solemnized by the person, and in the manner prescribed by, and practiced in, such society. (V. C. 1873, ch. 104, § 6; V. C. 1887, ch. 100, § 2221.)

2^l. The Fee to be paid to the *Celebrant* by the Husband.

The fee is one dollar, and for exacting more a forfeiture to the party aggrieved, of \$50, is denounced. (V. C. 1873, ch. 104, § 8; V. C. 1887, ch. 100, § 2223.)

3^l. Effect of Want of Authority in the *Celebrant*.

No marriage solemnized by any person professing to be authorized shall be deemed to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons married, or *either of them*, that they have been lawfully joined in marriage. (V. C. 1873, ch. 104, § 7; V. C. 1887, ch. 100, § 2222.)

4^l. Penalty on *Celebrant* for Celebrating Marriage Illegally.

Knowingly to perform the ceremony of marriage without lawful license, or to officiate without lawful authority, subjects the offender to confinement in jail for not more than one year, and to a fine not exceeding

\$500; and to perform the ceremony of marriage between a white person and a negro incurs a forfeiture of \$200, *one-half to the informer*. (V. C. 1873, ch. 192, §§ 5, 9; V. C. 1887, ch. 185, §§ 3785, 3789.)

- 5^l. Penalty on the *Celebrant* for Making a False Report, or no Report, of the Celebration of the Marriage.

He forfeits the penalty of his bond (*Supra* 1^m), and \$100 to \$500 besides. (V. C. 1873, ch. 104, §§ 19, 38; V. C. 1887, ch. 100, § 2232.)

- 4^k. The Marriage Register.

The *marriage register*, in Virginia, consists of the license; of an abstract of the certificate furnished to the clerk when the license is obtained (*Supra* p. 269, 3^h); and of the *celebrant's* return (*Supra* p. 269, 4^h)—all of which it is the clerk's duty to record; and such record is *prima facie* evidence of the facts therein set forth. (V. C. 1873, ch. 104, § 28; V. C. 1887, ch. 100, § 2241; Moore's Case, 9 Leigh, 639.)

- 3ⁱ. Summary of the Circumstances Usually Necessary to the Validity of a Marriage in Virginia.

It seems that no marriage in this commonwealth is *ipso facto* void, or indeed, in general, *voidable*, which is celebrated by a person professing, and believed by either party to be authorized to celebrate it, or as is supposed, which is constituted by mutual agreement of the parties—probably even without a license—between single persons; of sound mind; of like color, that is, both whites, or both negroes; of age to consent thereto (fourteen in males, and twelve in females); and actually consenting. (V. C. 1873, ch. 104, §§ 1, 3, 4 to 7; V. C. 1887, ch. 100, §§ 2216 to 2218, 2219 to 2222.)

There are, however, certain circumstances, not included in the foregoing enumeration, which may render such a marriage as is above supposed *voidable*. They have been already stated (*Ante*, pp. 262 & seq., 1^h), and will be referred to again. (*Post*, pp. 287 & seq.)

- 4^h. Effect of Foreign Marriages; w. c.

- 1ⁱ. The General Doctrine.

The law of marriage is a part of the *jus gentium*, the law of civilized mankind, and it is a general rule that a marriage, valid by the law of the place where it is celebrated, is valid everywhere; and if invalid by that law, it is invalid everywhere. This is the acknowledged doctrine in England and the United States, so that the *lex loci contractus* prevails over the *lex domicilii*, even though the parties leave their domicile in order to evade the law thereof, unless that law shall expressly direct otherwise. Hence, Scotch marriages are valid in England, and Maryland and North Carolina marriages in Virginia, although

contracted by citizens of England or of Virginia respectively, and not in accordance with the laws of the parties' domicile, from the obligation of which they designed to escape. (Stor. Confl. of L. §§ 87 & seq.; Id. §§ 113, 121; 2 Kent's Com. 91 & seq.; 2 Pars. Cont. 104 & seq.; Bac. Abr. Marr. & Div. (D); Dalrymple v. Dalrymple, 2 Hagg. C. R. 54; Herbert v. Herbert, 2 Id. 263.) And this doctrine is as well applicable to the *capacity* of the parties to contract, as to the *ceremonies* to be observed. (3 Min. Insts. 129; Stor. Confl. L. §§ 100 & seq., 241; 2 Kent's Com. (12th ed.) 459, n. (b); Male v. Roberts, 3 Esp. 164; Thompson v. Ketcham, 8 Johns. (N. Y.) 189; Dougherty v. Snyder, 15 S. & R. (Pa.) 84.)

2ⁱ. Qualifications of the General Doctrine.

The general doctrine that a marriage which is valid where it is contracted is valid everywhere, is materially qualified in three instances, namely, (1), When the marriage is *incestuous* or *polygamous*; (2), When it is prohibited to be contracted *even abroad*, by the law of the country to which the parties belong; and (3), When the marriage abroad is, from peculiar circumstances, celebrated *according to the law of the domicile*, and not of the place of contract;

W. C.

1^k. When the Marriage is Incestuous or Polygamous.

Marriages condemned by the general sense and policy of civilized mankind, as at war with sound morals and social order, are not within the principle above stated; but if opposed only to the particular regulations of the country where the parties are domiciled, and where the validity of the marriage is called in question, the marriage, if lawful where it was entered into, is, notwithstanding, unimpeachable in their domicile. Hence, the marriage of a brother and sister, or of an uncle and niece, although permitted by the law of the country where it took place (if there be such a country), would nevertheless be voidable in Virginia; whilst the marriage of a man to his deceased wife's sister, contracted in Virginia, would be valid in England, although prohibited by the English laws. And so the marriage of one divorced *a vinculo matrimonii* for adultery, although forbidden by the laws of Kentucky, will be valid there if contracted in Tennessee, where no such prohibition exists. (Stor. Confl. L. § 113 & seq.; 2 Kent's Com. 93; 2 Pars. Cont. 106 & seq.; Bac. Abr. Marr. & Div. (D.); Robinson v. Bland, 2 Burr. 1079; Ilderton v. Ilderton, 2 H. Bl. 145, 162. W. Cambridge v. Lexington, 1 Pick. (Mass.) 510.)

- 2^k. When the Marriage is Prohibited to be Contracted *even Abroad*, by the Law of the Country to which the Parties Belong.

In general, the laws of a country extend not in effect beyond its limits; but it is, notwithstanding, competent to a State to follow its subjects abroad, and to attach to their acts done there the same consequences as if done in their own country. Thus, the civil code of France annuls the marriages of Frenchmen contracted in foreign countries contrary to the injunctions of the French law; England denies the validity of subsequent marriages entered into after a *foreign* divorce, dissolving a previous English marriage; and also marriage to a deceased wife's sister, and the law of Virginia attaches the same consequences, in respect of punishment and invalidity, to marriages within its own prescribed degrees of consanguinity and affinity, or where one party has a former husband, or wife living, or between a white person and negro, contracted by residents of the State who *go out of it for the purpose* of the marriage, and with the intention of returning, and who do return, to reside as if the marriage had been contracted in this State, and their cohabitation here as man and wife is evidence of the marriage. (Stor. Conf. L. § 117; Synops. Crim. L. 171 '2; V. C. 1873, ch. 192, § 3; Id. c. 105, § 2; V. C. 1887, ch. 101, § 2253; Id. ch. 185, § 3783; Kinney's Case, 30 Grat. 865. *Ante*, p. 260.)

There are, indeed, authorities which affirm that wherever the marriage is contrary to the law of the *domicile* of the parties, and is by that law declared to be void, it is void though contracted abroad, in a country where it was lawful, at least if the parties went abroad for the purpose, designing to return, and actually returning, and that independently of any statutory provision invalidating such marriage when so contracted abroad. (Brook v. Brook, 9 H. L. C. 193; Williams v. Oates, 5 Ired. (N. C.) 535; State v. Kennedy, 76 (N. C.) 251; Kinney's Case, 30 Grat. 865.)

- 3^k. When the Marriage Abroad is, from peculiar Circumstances, Celebrated according to the *Law of the Domicile*, and not of the *Place of Contract*.

Subjects resident abroad in *factories*, that is commercial establishments; in conquered places; in barbarous or desert countries, or in countries of a different religion, as Mohammedan or Pagan, are permitted, by a sort of moral necessity, to contract marriage according to the laws of their own country; and such a marriage is valid, although not in accordance with the *lex loci contractus*.

(Stor. Confl. L. §§ 118 & seq.; Catherwood v. Caslon, 13 M. & W. 264.)

5^h. The Proof to be made of Marriage; w. c.

1ⁱ. Proof of Marriage in Criminal Prosecutions (*e. g.*, for *Bigamy*), and in Civil actions for *Adultery*.

The uniform practice of a century has settled that, in prosecutions for bigamy, and in actions for adultery, it is necessary to prove an *actual marriage*, valid, or avoidable and not yet avoided. The proof must be either by some witness present at the marriage; by the marriage-register, and proof of the identity of the parties; or by the acknowledgment of the accused, or adverse party. (2 Stark. Ev. 698-9; 2 Greenl. Ev. §§ 461 & seq.; Bac. Abr. Marr. & Div. (F.); Morris v. Miller, 4 Burr. 2057; Birt v. Barlow, 1 Dougl. 171, Catherwood v. Caslon, 13 M. & W. 265; Warner's Case, 2 Va. Cas. 95; Moore's Case, 9 Leigh, 639; O'Neal's Case, 17 Grat. 582, *Ante*, p. 269, 4; Womack v. Tankersley, 78 Va. 242.)

But in prosecutions for incestuous marriages, and marriages of white persons with negroes, where the parties go out of the state for the purpose of being married, and with the intention of returning, and are married out of it, and do return to and reside in it, the fact of their cohabitation here as man and wife, shall be evidence of their marriage. (V. C. 1887 ch. 185, § 3783.)

2ⁱ. Proof of Marriage in all *Civil Proceedings*, except the Action for Adultery.

In all *civil* proceedings, except the action for adultery, cohabitation and general reputation are sufficient evidence of the marriage; and a man who introduces a woman into society as his wife is *estopped* by that conduct to deny that she is so, so far as regards his liability for necessities furnished her. (2 Greenl. Ev. § 461; Bac. Abr. Barr. & F. (H.); Jackson v. Claw, 18 Johns. 346; Rice v. Efford, 3 H. & M. 230; Purcell v. Purcell, 4 H. & M. 507.)

2^g. Contract to Marry *in futuro*.

The contract to marry *in futuro* requires us to advert to, (1), The doctrine as to mutuality in the contract; (2), The effect of infancy on the contract; (3), The proof of the contract to marry; (4), Time for the performance of the contract; (5), The enforcement of the contract to marry; (6), Defences to actions for breach of promise to marry; and (7), Damages for breach of promise to marry;

w. c.

1^h. The Mutuality of the Contract.

As in all other contracts, so in contracts to marry, the obligation must be *mutual*. Although it appear that one party actually did promise, yet if the other do not

accept the promise, there is no contract. It is not needful, however, to prove a promise or an acceptance in *liti- dem verbis*. It may be as well evidenced by the unequivocal conduct of the parties; and where the promise of the man is proved, the woman demeaning herself as if she concurred in his promise, is sufficient evidence of her promise to marry him. (2 Chit. Cont. (11 Am. ed.) 790-791; 1 Pars. Cont. 544; Wightman v. Coates, 15 Mass. 1, 5; Russell v. Cowles, 15 Gray, (Mass.) 582; Moritz v. Melhorn, 13 Penn. St. 331; Southard v. Rexford, 6 Cow. (N. Y.) 254; Burnham v. Cornwall, 16 B. Monr. (Ky.) 284; Fible v. Caplinger, 13 B. Monr. 464; Hutton v. Mansell, 3 Salk. 16, 64; Daniel v. Bowles, 2 Carr. & P. (12 E. C. L.) 553.)

2^b. Effect of Infancy on the Contract.

The effect of infancy on the contract to marry *in futuro* is the same as in other contracts. The infant may avoid the contract at his pleasure, whilst it is binding on the adult. (1 Pars. Cont. 544-5; Holt v. Ward, 2 Str. 937.)

3^b. Proof of the Contract to Marry.

The proof need not be *in writing*. The provision of the statute of parol agreements (V. C. 1873, ch. 140 § 1; V. C. 1887, ch. 133, § 2840 (cl. 5),) that no action shall be brought "upon any agreement made *upon consideration of marriage*," unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged thereby, or his agent, is understood to refer only to *marriage settlements*. Where the promise, however, is to marry *after the lapse of more than a year*, it would doubtless be within another clause of that statute, which requires agreements not to be performed *within a year* to be in writing. (V. C. 1887, ch. 133, § 2840, (cl. 7).) The evidence of a contract to marry, in the nature of things, must in general be verbal only; and more than in other contracts dependent on inference from such circumstances as usually attend a matrimonial engagement, such as frequent visits, the understanding of friends and relatives, preparations for marriage, the reception of the man by the family as a suitor, &c. (2 Chit. Cont. (11 Am. ed.) 790 & seq.; 1 Pars. Cont. 545 to 547; Cases *Supra*, 1^b.)

4^b. Time for the Performance of the Contract to Marry.

No precise time for the consummation of the engagement needs to have been agreed upon. Upon a general promise to marry, the law presumes that it is intended to be performed in a *reasonable* and convenient time. And if both parties concur in postponing it unreasonably, it may perhaps be thence concluded, in the absence of any negative evidence, that it is *mutually* abandoned. (2 Chit. Cont. (11 Am. ed.) 791; 1 Pars. Cont. 547.)

5^h. Enforcement of Contract to Marry; w. c.1ⁱ. Specific Enforcement of Contract.

Formerly, as we have seen, the ecclesiastical courts, in England, exercised the jurisdiction to compel a party to celebrate *in facie ecclesiæ* a marriage which had been already contracted *per verba de presenti*, or *per verba de futuro*, if followed by consummation (*Ante*, p. 256, 1^k); but this jurisdiction has not existed in England since 1754 (26 Geo. II., c. 33), and seems never to have gained foothold in Virginia. Neither the court of equity, nor any other tribunal, has power here to enforce specific compliance with a promise to marry; the only redress being an action at law for damages for a breach of the engagement. (1 Tuck. Com. 99, B. I.)

2ⁱ. Action at Law for Damages for Breach of Contract.

The action at law for the breach of the promise to marry is the only remedy for such an injury. It proposes to seek compensation in damages, which, however inadequate they may be, yet constitute the sole redress to the complainant, and, what is more to be considered, the sole legal punishment to the wrong-doer, unless the female, being of previous chaste character, has been *seduced* under promise of marriage, in which case the seducer is guilty of a *felony*, punishable by confinement in the penitentiary from two to ten years. (V. C. 1873, ch. 187, § 16; V. C. 1887, ch. 180, §§ 3677, 3679.) The amount of damages is committed entirely to the discretion of the jury, subject only to such *equitable* control as, in extreme cases, the court may exercise through the medium of a *new trial*. (1 Tuck. Com. 99, B. I.; 1 Pars. Cont. 543; Sedgwick on Dam. 210, 368-9.)

6^h. Defences to Actions for Breach of Promise to Marry.

The defences to actions for breach of promise to marry may be, (1), The existence of legal obstructions to the marriage; (2), The unchaste character or lascivious conduct of a female plaintiff; (3), Consent obtained by misrepresentation; (4), Release of the promise; (5), Pre-engagement of plaintiff to another party; and (6), The death of either party;

w. c.

1ⁱ. Existence of Legal Obstructions to the Marriage.

Thus, the prior marriage of either party, the consort being still alive, and the marriage undissolved, consanguinity, affinity, insanity at the time of the promise, or impotency, or any other circumstance which would be ground for *avoiding* the marriage, is a defence to the action for not consummating it. (1 Pars. Cont. 548; 2 Chit. Cont. (11 Am. ed.) 792-3; *Harrison v. Cage*, 1 Ld. Raym. 386, 387.)

2^d. The Unchaste Character, or Lascivious Conduct of a Female Plaintiff.

The unchaste character, or lascivious conduct of the plaintiff towards other men, constitutes a sufficient reason for declining to fulfil the engagement to marry, provided these circumstances were *not known to the defendant* when it was contracted. Otherwise they form no defence, however they may and ought to go to *lessen the damages*. Evidence of *reputation* is receivable to prove an allegation of *general* bad character, but specific misconduct alleged must be specifically proved. (2 Chit. Cont. (11 Am. ed.) 793, 795; 3 Min. Insts. 303; Sedgw. Dam. 369.)

3^d. Consent Obtained by Misrepresentation.

If the promise to marry were induced by false and fraudulent misrepresentations of any material fact of fortune, station in life, or previous conduct, or, it would seem, of antecedent condition, as widowed, or otherwise, the promise is thereby invalidated, supposing the defendant to have been thereby deceived. (Wharton v. Lewis, 1 Carr. & P. (11 E. C. L.) 529; Foote v. Hayne, Id. 545; 1 Pars. Cont. 550.)

4^d. Release of Promise.

The subsequent release of the promise to marry is a good defence, provided it be founded on *valuable* consideration, as it would be if it were a *mutual* release. And a long-continued cessation of intercourse and visits, not otherwise accounted for, tends to prove the plea. (1 Pars. Cont. 550; King v. Gillette, 7 M. & W. 55; Davis v. Bomford, 6 Hurlst. & Norm. 245.)

5^d Pre-engagement of Plaintiff to Another Party.

This is *said* to be a good defence, because the plaintiff ought not in justice to recover for a wrong which could only have been committed against him or her in consequence of a similar injury which he or she had previously done to a third person. (1 Pars. Cont. 550, 551.) This, however, seems to be a remarkable extension of the *doctrine of set-off*, and certainly requires confirmation. The true doctrine seems to be that, in order that the pre-engagement of the plaintiff to another person may be a defence, it must not only have been unknown to defendant, but must have been *fraudulently concealed* from him or her. (2 Chit. Cont. (11 Am. ed.) 792; Beachey v. Brown, El. Bl. & El. (96 E. C. L.) 802.) Even the fact that the defendant was married when the promise was made is no defence, if the promise were to marry, not at some definite time, but within a reasonable period, for within that period the consort might die, and so make the performance possible. (Wild v. Harris, 7 C. B. (62 E. C. L.) 1004; Millwood v. Littlewood, 5 Excheq. 777 '85.)

6ⁱ. The Death of Either Party.

The breach of promise to marry so far resembles a *tort* (the action therefor being usually considered *in personam*), that the action is said not to survive against the promisor's personal representative, nor in favor of the promisee's, unless special damage to the *promisee's estate* is alleged and proved. (1 Pars. Cont. 552-'3; 4 Min. Insts. 794; Chamberlain v. Williamson, 2 M. & S. 408, 416; Hovey v. Page, 55 Maine, 142; Stebbins v. Palmer, 1 Pick. (Mass.) 71; Grubb v. Sult, 32 Grat. 204; Burton v. Mill, 78 Va. 482.)

Sundry *dicta* have been from time to time advanced judicially, allowing as defences to actions for breach of promise of marriage, what, by the better doctrine, are now discarded as such; such as the subsequent appearance of mortal or dangerous disease in the plaintiff, not known when the contract was made. (Atkinson v. Baker, Peake. Add. Cas. 100 *per* *Ld.* (Kenyon); or the discovery of bad *general* character, (Boddely v. Mortlock, 1 Holt, (3 E. C. L.) 151 *per* *Gibbs, C. J.*); or the exhibition of great coarseness of character and want of feeling, (Leeds v. Cook, 4 Esp. 257, *per* *Ld.* *Ellenborough*). It seems to be at present established that no unsoundness of mind, short of insanity, at the time of the promise, nor defect of character, except the want of chastity in a woman, nor of bodily health, except incurable impotency in either party, is a *defence* to the action; however, the damages may be mitigated by some or all of these considerations. (Beachey v. Brown, El. Bl. & El. (96 E. C. L.) 802; Hall v. Wright, *Id.* 772 & seq.; Baker v. Cartwright, 10 C. B. (N. S.) (100 E. C. L.) 127.)

7^h. Damages for Breach of Promise to Marry.

In the action for breach of marriage-promise damages are reckoned to be peculiarly within the discretion of the jury, whose verdict the court is always reluctant to set aside on the ground of excessiveness, and especially if the defendant has aggravated the wrong done by impeaching the plaintiff's character unsuccessfully. But it is said that the woman cannot in this action *properly* recover for *seduction*, although, if the fact of seduction incidentally comes to the knowledge of the jury (as it will seldom in practice fail to do), and they are thereby led to augment the damages, it is not a ground for vacating the verdict. (1 Pars. Cont. 553; Sedgw. Dam. 369.)

8^o. Modes whereby Marriage is Dissolved.

Marriage is dissolved by, (1), Death; (2), Divorce;

W. C.

1^t. Death.

Marriage is dissolved of course by the natural death of either of the parties. (1 Bl. Com. 440; 2 Kent's Com. 95.)

2^d. Divorce.

The doctrines concerning divorce are to be traced in connection with, (1), The several kinds of divorce; (2), The causes for the several kinds of divorce; (3), The courts charged with the cognizance of divorce causes; (4), The effects of divorce; (5), The doctrine touching foreign sentences of divorce; and (6), Sundry matrimonial causes besides divorce;

W. C.

1st. The Several Kinds of Divorce.

Divorces are either, (1), *A mensa et toro*; or (2), *A vinculo matrimonii*;

W. C.

1^h. Divorce *a Mensa et Toro*.

This kind of divorce "from board and bed," merely separates the parties for an indefinite time, but always in hope of reconciliation, and without disturbing the marital relations as touching either person or property, further than such separation necessarily implies. They are still husband and wife, with all the privileges and obligations of that relation, save that of living together (unless by special order of the court which decrees the divorce, a further effect be given it); and to the wife, with all the disabilities of coverture. (1 Bl. Com. 441; 2 Bish. Marr. & Div. §§ 228, 729.)

2^h. Divorce *a Vinculo Matrimonii*.

This divorce, "from the bond of marriage," terminates and finally dissolves the relation, in some instances *ab initio*, so that the marriage being annulled from the beginning, is looked upon for the most purposes as having never existed; and in other instances, only from the *period of dissolution*; so that in the latter case, whilst the matrimonial relation, with all its obligations and disabilities, is thenceforward at an end; yet whatever effects and consequences may have previously attached, especially in the nature of *vested* rights to property, remain for the most part unimpaired, notwithstanding the dissolution, unless it be specially otherwise ordered by the sentence of divorce. (1 Bl. Com. 440; Bac. Abr. Marr. & Div. (F.) 3.)

2^d. The Causes for the Several Kinds of Divorce.

Religion, reason, and experience combine to enforce the sanctity of the marriage tie. If not held to be indissoluble altogether, it is at all events fitting, in the interests of society and of the true happiness of mankind, that it should be dissolved only in rare and extreme cases. And whilst a separation by means of a divorce *a mensa et toro*, which it may be hoped will be temporary only, is less to be deprecated, yet even that ought to be limited to cases where it is improper or impossible for the parties to live together. Nu-

merous causes of divorce, especially *from the bond of marriage*, are at once a sign and a cause of moral degeneracy, and surely bode ill for the future of any society.

We will inquire into the causes for divorce, (1), In England; and (2), In Virginia;

W. C.

1^h. The Causes for the Several Kinds of Divorce in England;

Let us note the causes for divorce, (1), *A mensa et toro*; and (2), *A vinculo matrimonii*;

W. C.

1ⁱ. The Causes for Divorce, a *Mensa et Toro*, in England.

"The repugnance of the law," says Sir Wm. Scott, the great legal oracle on this subject, "to dissolve the obligations of matrimonial cohabitation may operate with great severity upon *individuals*, yet it must be carefully remembered that the general happiness of the married life is *secured by its indissolubility*. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and wives; for necessity is a powerful master in teaching the duty which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement to their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general public good." (Evans v. Evans, 1 Hagg. C. R. (4 Eng. Ec. R.) 35, 36.)

The common law, therefore, acknowledges only two causes of divorce, *a mensa*, etc., namely: (1), Adultery; and (2), Cruelty, including just apprehension of bodily hurt;

W. C.

1^k. Adultery.

Adultery, although it is the *sole* supervenient cause allowed by the Scriptures for a *dissolution* of the marriage relation (Mat. v. 32; Mark x. 4 to 12), is by the common law of England, at least at present, a ground merely for a divorce *a mensa et toro*. (St. John v. St. John, 11 Ves. 532; 2 Burns' Eccles. L. 503.)

A divorce for adultery is not obtainable if the adultery be brought about by the other party's procurement or connivance, or if condonation is proved by the com-

plainant's cohabiting with the guilty consort after knowledge of the adultery, or if the defendant successfully recriminates by showing infidelity on the complainant's part. (1 Bl. Com. 441, n. (33); 2 Kent's Com. 100, &c.; 2 Burns' Ecc. L. 505; Beeby v. Beeby, 1 Hagg. (3 E. E. R.) 789; Reeves v. Reeves, 2 Phil. (1 E. E. R.) 125; Proctor v. Proctor, 1 Hagg. C. R. (4 E. E. R.) 292; Kirkwall v. Kirkwall, Id. 277; Timmings v. Timmings, 3 Hagg. (5 E. E. R.) 76; Rogers v. Rogers, Id. 13; Crewe v. Crewe, Id. 123.

And it should be observed, that the effect of cohabitation, as proving condonation, is less stringent on the wife than on the husband, for it is not improper that she should for a time manifest a patient forbearance. (D'Aguilar v. D'Aguilar, 1 Hagg. (3 E. E. R.) 773; Durant v. Durant, Id. 733; Beeby v. Beeby, Id. 789.)

It is an established maxim that a divorce is never to be decreed for adultery (or indeed for any other cause) upon the *confession* of the parties merely, without auxiliary proofs, experience having shown that such a practice is productive of collusion, and other flagitious frauds. (2 Burns' Eccles. L. 504-5; Mortimer v. Mortimer, 2 Hagg. C. R. (4 E. E. R.) 310; Baxter v. Baxter, 1 Mass. 346; Holland v. Holland, 2 Mass. 154; Bailey v. Bailey, 21 Grat. 50.)

But whilst, in England, adultery by the canon law, as enforced in the spiritual court, is cause only of divorce *a mensa et toro*, it has long been customary, when by a decree of divorce, *a mensa et toro*, or by a successful action for damages against the adulterer, the fact of adultery has been *judicially* ascertained, and to have been without default in the other party, for parliament to intervene, and by a special legislative act to grant to the injured party a divorce *a vinculo matrimonii*. (1 Bl. Com. 441, and n. (34); 2 Burns' Eccles. L. 501, n. (n).)

2^k. Cruelty.

Cruelty (*sævitia*), which authorizes a divorce *a mensa et toro*, is everything which tends to *bodily harm*, and thus renders cohabitation unsafe, or as it is expressed in the older cases, which involves danger of *life, limb, or health*. It is not needful to enquire from what motive such treatment proceeds, whether from turbulent passion, or from other causes possibly not inconsistent with affection, *e. g.*, jealousy. If bitter waters are flowing, it is not necessary to explore the fountains whence they spring. If bad passions are so uncontrolled as to jeopard the consort's safety, it is immaterial from what provocation the actual violence originated. It is, moreover, not necessary that there should be *actual* acts, if

there is reason to apprehend that they will be repeated. It suffices that the past, upon the whole, affords for the time to come a *reasonable apprehension* of bodily hurt. Although the complaint of cruelty usually comes from the wife, yet the husband is in like manner entitled to protection if he shall really need it. (Evans v. Evans, 1 Hagg. C. R. (4 E. E. R.) 36, 37; Holden v. Holden, Id. 452; Harris v. Harris, 2 Phill. (1 E. E. R.) 111; Waring v. Waring, Id. 132; D'Aguilar v. D'Aguilar, 1 Hagg. (3 E. E. R.) 773; 1 Bish. Marr. & Div. §§ 717, &c.)

Negatively, what merely wounds the *mental feelings*, without being accompanied by *bodily injury*, actual or menaced; mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, or even occasional sallies of passion, which do not threaten harm, although they be high offences against morality in the married state, do not amount to legal cruelty. (Evans v. Evans, 1 Hagg. C. R. (4 E. E. R.) 36; Carr v. Carr, 22 Grat. 173, 175; Latham v. Latham, 30 Grat. 321-'2.)

When the alleged acts of violence proceed from insanity, they are said not to constitute *cruelty*, and to afford no ground for divorce. (1 Bish. Marr. & Div. § 734, and cases cited. *Sed quære.*)

If the complainant (who although usually the wife, may also be, and has sometimes been, the husband), is the aggressor, provoking ill-treatment, by violent and outrageous conduct, a separation must be denied, and the party left to reform his or her own disposition and manners, and by a change of behavior to seek to remedy the evil. If, then, there is cause to complain, the party will be entitled to the protection of the court. (Waring v. Waring, 2 Phil. (1 E. E. R.) 132; Evans v. Evans, 1 Hagg. C. R. (4 E. E. R.) 35; Kirkman v. Kirkman, 1 Hagg. C. R. (4 E. E. R.) 409; 1 Bishop, Mar. & Div. §§ 717 & seq.)

Condonation applies to cruelty as well as to adultery; but it is in no case held so strictly against a wife as against a husband. Forbearance in her may be a virtue, and does not in general weaken her title to relief. Condonation is, moreover, always conditional, so that, if the offence be repeated, the effect of the condonation is done away with, and of course it can never be applicable to the subsequent offence. (Durant v. Durant, 1 Hagg. (3 E. E. R.) 733; D'Aguilar v. D'Aguilar, Id. 733; Popkin v. Popkin, Id. 733, n. (a); Beeby v. Beeby, Id. 789; Westmeath v. Westmeath, 2 Hagg. Supp. (2 E. E. R.) 1.)

- 2ⁱ. The Causes for Divorce *a Vinculo Matrimonii*, in England.

The common law (adopting the canon) holds that marriage duly contracted is *absolutely indissoluble* for any *supervenient* cause whatsoever, not even excepting adultery. But, as we have seen, there are sundry impediments and disabilities (*Ante*, p. 255 & seq. 1^h, and 260 & seq. 2^h), which render the marriage either voidable or actually void, either because the connection is deemed to be *sinful*, or because, whether sinful or not, it is *contrary to public policy*. In any of these cases the proper courts may pronounce a sentence of divorce *a vinculo matrimonii*, not so much invalidating the marriage as declaring the legal conclusion that it was an unlawful connection, and *never was a marriage at all*. If for any supervenient cause (*e. g.*, adultery), a divorce *a vinculo* is desired, it can be had only through means of a special act of parliament, passed for the purpose, which will ascertain and declare the law of that particular case. (1 Bl. Com. 441. & n. (34); *Ante*, p. 281, 1^k; Bac. Abr. Marr. & Div. (F.) 3.)

The causes of divorce *a vinculo* in England, are these, (1), Canonical impediments, and (2), Civil or legal disabilities;

W. C.

1^k. Canonical Impediments.

Consanguinity and affinity, are now by statute 5 and 6 Wm. IV., c. 54, converted into *legal or civil* disabilities, so that natural or incurable impotency of body at the time of the marriage, is the only cause of divorce of this class now existing in England, pre-contract having been finally abolished as an impediment to a subsequent marriage, by statute 26 Geo. II., c. 33 (A. D. 1754), as already explained. (1 Bl. Com. 434 5, 440; *Ante*, pp. 256, 1^k, and 258, 3^k.)

The courts charged in England with this jurisdiction have been, until 1858, the ecclesiastical courts, which proceed in it upon the ground that the connection being adjudged *sinful*, the offenders should be separated, and the marriage dissolved *pro salute animarum*. But when dissolved, as it is thereby judicially ascertained to have been always unlawful, it is annulled, not from the time of the sentence only, but *ab initio*. The issue, therefore, is bastardized, and all rights of property growing out of the marriage are for the most part defeated. (1 Bl. Com. 434, 435, 440.)

And since this jurisdiction was exercised by the spiritual courts purely *pro salute animarum*, for the safety of the souls of the parties, they were not permitted to proceed after the death of either party; and if it were attempted, the court of king's bench was accustomed to award a writ of *prohibition* to restrain it. Hence, it has

come to be a settled maxim of the common law, that a marriage merely *voidable* is not capable of being annulled after the death of either consort, a maxim so consonant to sound policy that it ought to prevail apart from the technical reason on which it is based. (1 Bl. Com. 434-5; Elliott v. Gurr, 2 Phill. (1 E. E. R.) 16.)

By statute of 1858 (20 & 21 Vict. c. 85), the jurisdiction over matrimonial causes, so long exercised by the ecclesiastical courts, was transferred to a new court, by that statute created, styled the "Court for Divorce and Matrimonial Causes," which governs itself by the same general rules and principles as formerly prevailed in the courts ecclesiastical. (Wms. Pers. Prop. 492; 1 Broom & Hadley's Com. (B. I.), 358.)

2^k. Civil or Legal Disabilities.

The legal or civil disabilities, which, it will be remembered, are prior marriage, want of age, want of reason, and, formerly, want of consent of parents or guardians, make the marriage (except in the last case) *actually void* in England, without *any sentence* whatsoever. The want of consent of parents and guardians, however, does not, since 4 Geo. IV., c. 76, invalidate the marriage, but only exposes the parties to penalties (*Ante*, pp. 261 & seq. 4^k.) But as, in general, no prudent person would choose to determine for himself either the existence of the facts upon which the nullity of the marriage is based or their legal effect, it is not unfrequent to seek a formal decree of divorce on account of prior marriage still subsisting, want of age, and want of reason. The divorce, of course, is always *a vinculo matrimonii*, and ascertaining, as it does, that the connection was only a meretricious and not a matrimonial union, declares it to have been void *ab initio*, of course bastardizing the issue, and more entirely invalidating all rights of property connected with the marriage than even a divorce for the canonical impediments. (Bac. Abr. Marr. & Div. (F.) 3; Wightman v. Wightman, 4 Johns. Ch. R. (N. Y.) 343.)

2^h. The Causes for the Several Kinds of Divorce in Virginia; W. C.

1ⁱ. The Causes for Divorce *a Mensa et Toro* in Virginia.

These are determined by the provisions of the statute upon the subject, which declares that "a divorce from bed and board may be decreed for *cruelty, reasonable apprehension of bodily hurt, abandonment or desertion*," (V. C. 1873, ch. 105, § 7; V. C. 1887, ch. 101, § 2258,) which is little, if anything, more than an enactment of the common law as always administered in England in the spiritual courts;

W. C.

1^k. Cruelty.

What is *cruelty* has been already explained (*Ante*, p. 281, 2^k), and to that passage reference is now made.

2^k. Reasonable Apprehension of Bodily Hurt.

This reasonable apprehension of bodily hurt is included by Sir Wm. Scott under the idea of cruelty. It must be a *reasonable* apprehension, not an apprehension arising from an exquisite and diseased sensibility. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but they are not cases of legal relief. People must relieve themselves as well as they can by decent resistance or prudent conciliation, by calling in the succors of religion and the consolation of friends, but not by the aid of courts. (*Evans v. Evans*, 1 Hagg. C. R. (4 E. E. R.) 35, 37; *Popkins v. Popkins*, 1 Hagg. (3 E. E. R.) 733; *Ante*, pp. 281-2, 2^k; *Hulme v. Hulme*, 2 Add. (2 E. E. R.) 27; *Otway v. Otway*, 2 Phill. (1 E. E. R.) 95; *Oliver v. Oliver*, 1 Hagg. C. R. (4 E. E. R.) 351; *Carr v. Carr*, 22 Grat. 173, 175; *Latham v. Latham*, 30 Grat. 321-2.)

3^k. Abandonment, or Desertion.

No period for the continuance of the abandonment or desertion (it is not perceived that there is any difference in their meaning), is prescribed; but it is certainly less than *five years*, for if it continues so long as that, it is cause for a divorce *a vinculo matrimonii* (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257); and if, previous to the lapse of the five years, there be a sentence of divorce *a mensa et thoro* for desertion, after the expiration of that time, it may be converted into a divorce *a vinculo*. (V. C. 1873, ch. 105, § 15; V. C. 1887, ch. 101, § 2266.)

Wherever there is an actual breaking off of matrimonial cohabitation, combined with the *intent to desert* in the mind of the offender, without legal cause or excuse, and without the consent of the consort, a desertion is established; for a mere separation by *mutual consent*, is not desertion in either party, nor, as a matter of proof, can desertion be inferred against either from the mere unaided fact that they do not live together. Of the intent to desert, the court must in some way be affirmatively satisfied. It may be proved, with more or less probability, by a great variety of circumstances; as, for instance, by leaving the consort with a *declared* intention never to return; by absence for a long time, without reasonable necessity; by making no provision for a wife, when of ability to do so; by prohibiting the consort from following, and the like. (1 Bish. Marr. & Div. §§ 773, 777, 783; *Gregory v. Pierce*, 4 Mete. (Mass.) 478; *Bailey v. Bailey*,

21 Grat. 47-'8; Carr v. Carr, 22 Grat. 168; Latham v. Latham, 30 Grat. 322 & seq.; Harris v. Harris, 31 Grat. 28 & seq.)

In *Bailey v. Bailey* (21 Grat. 47), the letters of the parties were admitted to show the husband's intention to abandon his wife, the tenor of the letters, with the circumstances, excluding, in the opinion of the court, all possibility of collusion. The conduct of the husband otherwise was also thought, in that case, to afford sufficient proof of his intent. He was a professional gambler, and having married his wife in July, 1865, left her in November of that year to ply his nefarious trade in the cities, and during the next *two years* visited her *but once*; then remained only a *fortnight*; left her without taking leave, and upon returning, after her bill for divorce was filed, spurned her offer to be reconciled, and refused to visit his ill child, lest he might meet her. (21 Grat. 52.)

2ⁱ. The Causes for Divorce *a Vinculo Matrimonii* in Virginia.

The causes for divorce *a vinculo matrimonii* in Virginia are, (1), Such as exist at the time of the marriage; and (2), Such as supervene afterwards;

W. C.

1^k. Causes for Divorce *a Vinculo Matrimonii*, existing at the Time of the Marriage.

The causes of divorce *a vinculo matrimonii*, existing at the *time of the marriage*, may be thus enumerated, namely: (1), Prior marriage, when the consort still survives; (2), Want of age; (3), Difference of race, one party being white and the other a negro; (4), Want of reason; (5), Natural or incurable impotency of body at the time of marriage; (6), Consanguinity or affinity; (7), Conviction of either party of an *infamous offence* prior to the marriage, without the knowledge of the other; (8), Pregnancy of the wife at the time of the marriage, without the knowledge of the husband, by some person other than he; (9), Prostitution of the wife prior to the marriage, without the knowledge of the husband; and (10), Fraud or force;

W. C.

1^l. Prior Marriage, where the Consort still Survives, etc.

We have seen that a marriage, where either of the parties has a consort then living, is declared to be *absolutely void*, without any decree of divorce or other legal process. (V. C. 1873, ch. 105, § 1; V. C. 1887, ch. 101, § 2252; *Ante*, p. 265, 1ⁱ.) Notwithstanding, it may be, and generally is, desirable to have a judicial sentence,

ascertaining the fact of such prior marriage, especially if the party complaining contemplates marrying again. Accordingly, our statute makes provisions for instituting a suit to annul the second marriage, or rather to declare it null and void from the beginning. (V. C. 1873, ch. 105 § 4; V. C. 1887, ch. 101, § 2255; Bac. Abr. Marr. & Div. (F.) 3; Wrightman v. Wrightman, 4 Johns. Ch. R. (N. Y.) 343.)

2^d. Want of Age.

The age of consent to marriage, it will be remembered, with us, as in England, is *fourteen* in males and *twelve* in females. And in this instance also, although the marriage is by the statute expressly declared to be absolutely void, without any decree of divorce or other legal process, if the parties separate during *non-age*, and do not cohabit afterwards, yet a decree of divorce may, notwithstanding, be obtained, and in general it is expedient to obtain it. And it must be observed, that a party who at the time of the marriage was capable of consenting, with a party not so capable, is not allowed to institute a suit for the purpose of annulling the marriage. (V. C. 1873, ch. 105, § 3, 4; V. C. 1887, ch. 101, §§ 2254, 2255; *Ante*, pp. 265, 260-61.)

3^d. Difference of Race—one Party being *White*, and the other a *Negro*.

This, also, is one of the three causes which *per se* invalidate a marriage, without any decree of divorce or other legal process; but it may also be ground of divorce *a vinculo matrimonii*, if desired. (V. C. 1873, ch. 105, §§ 1, 4; V. C. 1887, ch. 101, §§ 2252, 2255; *Ante*, p. 265.) And as in the two preceding cases, (1st and 2^d), so in this, it is the part of prudence to obtain such a divorce, especially if the complainant desires to marry again. (McPherson's Case, 28 Grat. 940.)

4th. Want of Reason.

The want of reason at the time of the marriage, in Virginia, renders a marriage *voidable*, but *not void*, so that a decree of divorce *a vinculo matrimonii* is indispensable in order to invalidate it; and it is believed that such decree must be obtained in the *life-time of the parties*, or else that the marriage is thenceforward unimpeachable. (*Ante*, p. 283, 1^k; V. C. 1873, ch. 105, §§ 1, 4; V. C. 1887, ch. 101, §§ 2252, 2255.)

5th. Natural or Incurable Impotency of Body at the Time of Marriage.

This renders the marriage *voidable* only, and so makes a decree of divorce *a vinculo*, during the life-time of both parties, indispensable, in order to dissolve

it. (*Ante*, p. 283, 1^k; V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257.)

6^l. Consanguinity or Affinity.

The marriage being for these causes only *voidable*, a decree of divorce *a vinculo*, in the life-time of both parties, is required in order to invalidate it. (*Ante*, p. 283, 1^k; V. C. 1873, ch. 105, §§ 1, 4; V. C. 1887, ch. 101, §§ 2252, 2255.)

7^l. Conviction of either Party of an *Infamous Offence*, Prior to the Marriage, without the Knowledge of the Other.

The marriage being *voidable only*, requires a decree of divorce *a vinculo*, in the life-time of both parties, in order to avoid it. But no divorce is to be decreed if the party complaining has cohabited with the other party after knowledge of such conviction. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257; *Ante*, p. 283, 1^k.)

The propriety of allowing such a cause of divorce as this admits of not a little question. (See *Ante*, p. 264, 4ⁱ.)

8^l. The Pregnancy of the Wife at the *Time of the Marriage*, without the Knowledge of the Husband, by some Person other than he.

Here also, and for the same reason, there must be a sentence of divorce *a vinculo*, in the life-time of both parties, in order to annul the marriage. But no divorce is to be decreed if the husband has cohabited with his wife after knowledge of the fact that she was *en-ciente*. (*Ante*, p. 284, 1^k; V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257.)

9^l. The Prostitution of the Wife Prior to the Marriage without the Knowledge of the Husband.

The marriage being, in such case, *voidable only*, must be annulled by decree of divorce *a vinculo* in the life-time of both parties. But no divorce is to be decreed if the husband has cohabited with the wife after knowledge of the fact that she had been, prior to the marriage, a prostitute. (*Ante*, p. 283, 1^k; V. C. 1873, ch. 105, § 6; V. C. 1887 ch. 101, § 2257.)

10^l. Fraud or Force.

Every other contract being vitiated by *fraud and force*, there can hardly be a doubt that the contract of marriage is too, although our statutes make no mention of either. It seems to have been so assumed by Sir Wm. Scott, and the law is so stated by Chan. Kent, and impliedly by Lord Coke, who enumerates among the causes of divorce *a vinculo*, "*causa precontractus, causa metus*," etc. (2 Kent's Com. 76; 1 Th. Co. Lit. 125; 1 Bish. Marr. & Div. §§ 165 to 209; Fulwood's Case,

4 Cro. (Jac.) 493; Dalrymple v. Dalrymple, 2 Hagg. C. R. (4 E. E. R.) 44, 104; Franklin v. Franklin, with other cases in note to King v. Billingham, 3 M. & S. 259; Harford v. Morris, 2 Hagg. C. R. (4 E. E. R.) 423; Portsmouth v. Portsmouth, 1 Hagg. (3 E. E. R.) 355; Ferlat v. Grojon, 1 Hopk. Ch. (N. Y.) 478; S. C. 14 Am. Dec. 555; Foster v. Means, 1 Spears Eq. (S. C.) 569; S. C. 42 Am. Dec. 334; Willard v. Willard, 6 Baxt. (Tenn.) 297; S. C. 32 Am. Rep. 529; Mountholly v. Andover, 11 Vermont, 226; S. C. 34 Am. Dec. 686.)

The frauds, however, which justify a dissolution of the marriage are not deceits touching fortune, station in society, previous condition, health, etc., which may form an answer to an action for not fulfilling a promise to marry, at least so far as to reduce the damages. To allow any of these to vacate the relation actually assumed of husband and wife, would be grievously injurious to society. But the frauds which have this effect are frauds relating to the *identity of the person*, and, it is believed, those only. (1 Bl. Com. 439, n. (24); Wilson v. Brockley, 1 Phil. 137; Stayte v. Farquharson, 3 Add. (2 E. E. R.) 282; 1 Bish. Marr. & Div. §§ 167, 168 & seq.)

2^k. Causes in Virginia for Divorce *a Vinculo Matrimonii* Supervening after Marriage.

The causes in Virginia for divorce *a vinculo matrimonii*, which supervene after marriage, are these four, namely, (1), Adultery; (2), Sentence of either party to the penitentiary; (3), Indictment of either party for felony, when such party is a *fugitive from justice*, and has been *absent for two years*; and (4) Wilful abandonment or desertion *for five years*. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257.)

W. C.

1^l. Adultery.

The same general principles, as to adultery, prevail in Virginia as in England (see *Ante*, pp. 280 & seq. 1^k), except that in Virginia it is a cause of divorce *a vinculo*, and not, as in England, merely of divorce *a mensa*, etc. It is especially provided that the divorce shall not be granted if the parties have *voluntarily* cohabited after knowledge of the adultery, or if it occurred *more than five years* before the institution of the suit, or if it was committed by the procurement or connivance of the plaintiff; and also, that in granting a divorce for adultery, the court may decree that the guilty party shall not marry again, in which case the bond of matrimony is not dissolved as to that party. But this restriction the court may afterwards, for good cause,

remove. Nor indeed will it be imposed without reluctance, experience having proved how pernicious to society is the presence in it of a husband without a wife, or a wife without a husband. (V. C. 1873, ch. 105, §§ 6, 11, 14; V. C. 1887, ch. 101, §§ 2257, 2262, 2265; 2 Kent's Com. 100, &c.; 1 Bl. Com. 441, n. (33); Evans v. Evans, 1 Hagg. C. R. (4 Eng. Ec. R.) 35, 36.)

2¹. Sentence of either Party to the Penitentiary.

Where either party is sentenced to confinement in the penitentiary (which supposes *conviction of a felony*), a divorce *a vinculo matrimonii* may be decreed, and no pardon granted to the party sentenced shall restore his or her conjugal rights. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257.)

How far this cause of divorce is warranted, by sound and politic regard to the morals and order of society, well deserves the grave consideration of the legislature. To the writer it seems as little to be reconciled with wise policy as with the precepts of the Scriptures. See Mat. v. 31, 32; Id. xix. 5 to 10; Mark x. 7 to 12.

3¹. Indictment of either Party *for Felony*, when such Party is a *Fugitive from Justice*, and has been *Absent for Two Years*.

Where either party charged with an offence, punishable by death or confinement in the penitentiary (that is, charged with a *felony*, V. C. 1873, ch. 195, § 1; V. C. 1887, ch. 190, § 3879), has been indicted, is a fugitive from justice, and has been absent for two years, a divorce from the bond of matrimony may be decreed. (V. C. 1873, ch. 105, § 6; V. C. 1887, ch. 101, § 2257.)

This belongs to the same category as the preceding, and is liable to the same observation. As a more recent instance of legislation, looking in the same direction, it is yet more to be deplored. It is vain to expect that individuals will conform their conduct to even the coarser rules of morality and virtue, when the laws of the land admit and encourage a license at variance with the *spirit* of Christian teaching, and hardly to be reconciled with its *letter*.

4¹. Wilful Abandonment or Desertion *for Five Years*.

Where either party wilfully abandons or deserts the other for *five years*, a divorce from the bond of matrimony may be decreed to the party abandoned; and if before the lapse of five years a divorce *a mensa et toro* be granted (as described, *Ante*, pp. 285, &c. 3^k), it may be converted after the expiration of that time into a divorce *a vinculo*. (V. C. 1873, ch. 105, §§ 6, 15; V. C. 1887, ch. 101, §§ 2257, 2266.)

Abandonment is so grave an offence against the obli-

gations of marriage, and so mischievous, as tending, amongst other evils, to tempt the party abandoned, if not the other also, from the paths of virtue, as to merit severe reprobation, and to afford a somewhat more sufficient reason for dissolving the marital relation than some of those previously passed in review. The Saviour appears to refer to those pernicious consequences of desertion when he says (Mat. v. 32): "Whosoever shall put away his wife, saving for the cause of fornication, *causeth her to commit adultery.*" At all events, such consequences do in fact frequently result. (See *Reeves v. Reeves*, 2 Phill. (E. E. R.) 125; *Sullivan v. Sullivan*, 2 Add. (2 E. E. R.) 299; *Morgan v. Morgan*, 2 Curt. (7 E. E. R.) 697.) It ought to be observed, however, that so profound and judicious a moralist as Sir Wm. Scott was of opinion that desertion, unless in conjunction with acts of cruelty, was *never* a ground even of separation. (*Evans v. Evans*, 1 Hagge. C. R. (4 E. E. R.) 119.)

We have seen (*Ante*, p. 285, 3^k), that to constitute desertion or abandonment there must be, first, the actual breaking off of matrimonial cohabitation, and secondly, an intent to desert in the mind of the offender, without legal cause or excuse. Both must concur to complete the desertion. A mere separation by mutual consent is not desertion in either, nor, as a matter of proof, can desertion be inferred against either from the mere unaided fact that the parties do not live together; though protracted absence, with other circumstances, may establish the original intent. It is obvious, however, and follows from the established principles of evidence, that when the two necessary elements of an actual separation, and an intent to desert, are once shown, the same intent will be presumed to continue until the contrary appear. (1 Bish. Marr. & Div. §§ 773, 777; 1 Greenl. Ev. §§ 41, 42; *Gray v. Gray*, 15 Ala. 779; *Bailey v. Bailey*, 21 Grat. 47; *Carr v. Carr*, 22 Grat. 172; *Latham v. Latham*, 30 Grat. 322, &c.) The abandonment or desertion, therefore, which is cause for a divorce *a vinculo matrimonii*, differs from that which is cause for a divorce *a mensa*, etc., in nothing save only *duration*. The fact of abandonment, with the intent to desert, must be established in either case; and when it has continued for *five years* it warrants a decree of divorce from the bonds of marriage. (*Harris v. Harris*, 31 Grat. 13, 28, &c.)

3*. The Courts Charged with the Cognizance of Divorce causes; w. c.

- 1^b. The Courts which in England have Cognizance of Divorce Causes.

They were formerly the courts ecclesiastical, which for many ages had jurisdiction of all matrimonial causes in that country. Originally the cognizance of such causes belonged to the temporal courts, but because matrimony by the Romish Church (which, until the Reformation, was the Church of England) was deemed a *sacrament*; because also it was celebrated (at least from the time of Pope Innocent III., A. D. 1200) by a *person in orders*, whose conduct was under the diocesan's inspection; and because lastly, in case of the *Levitical degrees* in particular the ecclesiastics were presumed to be the best judges of the true meaning of God's law, the jurisdiction has for several centuries been vested in the church courts. (1 Bl. Com. 434, 440, 441; 2 Burns' Eccles. Law, 485.)

But in 1858, by Stat. 20 & 21 Vict. c. 85, the jurisdiction over causes matrimonial was transferred to a new court, created by that statute, styled the "Court for Divorce and Matrimonial Causes," which governs itself by the same general rules and principles as formerly prevailed in the ecclesiastical courts. (Wms. Pers. Prop. 492; 1 Broom & Hadley's Com. (B. I.) 358.)

- 2^b. The Courts which in Virginia have Cognizance of Divorce Causes.

There never having been any ecclesiastical courts in Virginia, matrimonial causes have always been of necessity committed to temporal courts. Except only in the instance of incestuous marriages, and marriages between a white person and a negro, which are *crimes*, and like other crimes are cognizable (that is, when prosecuted as *crimes*), in the county and corporation courts, the depositaries of this delicate and important jurisdiction are the circuit and corporation courts, on the *chancery side* thereof. (V. C. 1873, ch. 105, § 8; Id. ch. 192, § 3; Id. ch. 154, §§ 5, 38; Id. ch. 155, § 2; V. C. 1887, ch. 101, § 2259; Id. ch. 185, § 3783; Id. ch. 147, §§ 3046, 3055; Id. ch. 148, § 3058.)

But no such suit is maintainable in the Virginia courts at all, unless the parties, or one of them, has been a *resident* of the State—that is, *domiciled* in it (Stor. Conf. L. §§ 225, 227)—for at least one year preceding the *time of bringing the suit*. (V. C. 1873, ch. 105, § 8; V. C. 1887, ch. 101, § 2259.)

Let us observe, (1), The circuit or corporation court of what county or corporation has cognizance of a divorce cause; (2), The modes of proceeding in divorce causes; and (3), The powers belonging to the court;

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- 1ⁱ. The Circuit or Corporation Court of what County or Corporation has Cognizance of Divorce Causes.

The statute prescribes that the suit shall be brought in the county or corporation in which the parties *last inhabited*, or (at the option of the plaintiff) in which the *defendant resides*; or if the defendant is not a resident in the State, then in which the *plaintiff resides*. (V. C. 1873, ch. 105, § 8; V. C. 1887, ch. 101, § 2259.)

- 2ⁱ. The Modes of Proceeding in Divorce Causes; w. c.

- 1^k. Mode of Proceeding in Case of *Incestuous Marriages*, and Marriages *between White Persons and Negroes*.

An incestuous marriage is a *crime*, and for an offence so repugnant to decency and virtue, the parties are liable to be indicted in the *law courts* (with us the county and corporation courts), which have general cognizance of crimes. Each may be fined not exceeding \$500, and imprisoned in the jail not more than six months, and the marriage, if solemnized within this State, is void *from the time of the conviction*. (V. C. 1873, ch. 192, § 3; Id. ch. 105, § 1; V. C. 1887, ch. 185, § 3783; Id. ch. 101, § 2252.)

So a marriage between a white person and a negro is a *crime*, properly enough, because such connections are unfriendly to the good order of society, and to sound policy; but with an extraordinary *inveteracy of virtue*, it is made a *felony*. Any white person who shall intermarry with a negro, or any negro who shall intermarry with a white person, shall be confined in the penitentiary not less than two nor more than five years. (V. C. 1887, ch. 185, § 3783.) The cognizance of such a marriage, being a crime, is with the courts of criminal jurisdiction, that is with us the county and corporation courts, and the marriage is declared to be void *from the time it was contracted*. (V. C. 1873, ch. 192, § 3; Id. ch. 105, § 1; V. C. 1887, ch. 185, § 3783; Id. ch. 101, § 2252; Id. ch. 147, §§ 3046, 3055; Kinney's Case, 30 Grat. 858; Jones' Case, 80 Va. 538.)

But whilst this method is provided in these cases in order to *punish and separate* the parties, for the sake of society, to which such connections are offensive and injurious, either of them may apply to the proper circuit or corporation court *in chancery*, and procure from it a sentence of nullity. (V. C. 1873, ch. 105, §§ 6, 4; V. C. 1887, ch. 101, § 2259.)

- 2^k. Mode of proceeding in all other Cases than those of Incestuous Marriages, and Marriages between a White Person and a Negro, treated as *Crimes*.

The application must be made in all other cases than incestuous marriages, or marriages between a white

person and a negro, *treated as crimes*, to the circuit or corporation courts in chancery. It may be made by either party, and the suit is instituted and conducted like other suits in equity, except that the bill shall not be *taken for confessed*, and whether the defendant answer or not, the cause shall be heard *independently of admissions* of either party, in the pleadings or otherwise. And costs may be awarded to either party, as justice may require. (V. C. 1873, ch. 105, § 9; V. C. 1887, ch. 101, § 2260.)

The object of these provisions is to prevent a divorce from being obtained by the *collusion of the parties*; and they are no more than an enactment of principles which have always prevailed in matrimonial causes, as we have seen. (*Ante*, p. 281, 1^k; *Bailey v. Bailey*, 21 Grat. 50; 2 Burns' Eccles. L. 504-5.) Neither the common law rule nor the statutory enactment *excludes* proof of the admissions and statements of the parties. Their only effect is to prohibit a sentence from being founded *wholly* upon such admissions. When collusion is proved not to exist, admissions, whether verbal or contained in letters, are peculiarly satisfactory evidence; and especially is it so when the letters were written, or the verbal statements made, without reference to the controversy touching the divorce. (*Bailey v. Bailey*, 21 Grat. 50, 51; *Cralle v. Cralle*, 79 Va. 186.)

3ⁱ. The Powers of the Court; w. c.

1^k. The Powers of the Court *Pending the Suit* for a Divorce.

The court in term, or the judge in vacation, may, at any time *pending the suit*, make any proper order, (1st), to compel the man to pay any sums necessary for the maintenance of the woman, and to enable her to carry on the suit; or (2d), to provide for the custody and maintenance of the minor children of the parties during the pendency of the suit; or (3), to preserve the estate of the man so that it may be forthcoming to meet the decree; or (4th), to compel him to give security to abide such decree. (V. C. 1873, ch. 105, § 10; V. C. 1887, ch. 101, § 2261.)

2^k. The Powers of the Court in *Making its Decree*; w. c.

1^l. In Respect to the Estate and Children of the Parties.

Upon decreeing the nullity of a marriage, or a divorce, either *a mensa*, etc., or *a vinculo matrimonii*, the court may make such further decree as it shall deem expedient concerning the *estate and maintenance* of either party, and the *care, custody, and maintenance of their minor children*; and from time to time afterwards, on the petition of either parent, alter such de-

decree as to the care, custody, and maintenance of the children as the circumstances of the parents and the benefit of the children may require. But it is to be understood that the court may not, by any such decree in the interest of the wife, interfere with or defeat the *vested* rights of creditors of the husband, or of *bona fide* alienees, or incumbrances which attached on the property previous to the institution of proceedings in the divorce suit, if the husband had any right so to alienate or charge the property. (V. C. 1873, ch. 105, § 12; V. C. 1887, ch. 101, § 2263; Jennings, &c. v. Montague, 2 Grat. 350; Bailey v. Bailey, 21 Grat. 57; Carr v. Carr, 22 Grat. 174; Harris v. Harris, 31 Grat. 16 & seq.; Cralle v. Cralle, 81 Va. 773.)

2. In Respect to the Separation of the Parties.

In granting a divorce *a mensa et toro*, the court may decree that the parties be *perpetually separated*, and protected in their persons and property; which shall operate upon property thereafter acquired, and upon the *personal rights* and *legal capacities* of the parties, as a decree for a divorce from the *bond of matrimony*, except that neither party shall marry again during the life of the other. But a decree of perpetual, or limited separation, *may be revoked* at any time by the court which pronounced it, under such regulations and restrictions as the court may impose, upon the *joint application* of the parties, and satisfactory evidence of their reconciliation. And a divorce *a mensa*, etc., for desertion, may, after five years, if the desertion still continues, and no reconciliation be probable, be converted into a divorce from the bond of matrimony. (V. C. 1873, ch. 105, §§ 13, 15; V. C. 1887, ch. 101, §§ 2264, 2266.)

3^d. Prohibition upon the Legislature, in Virginia, to Grant Divorces.

From the foundation of the colony, the legislature in Virginia had exercised the power of granting divorces *a mensa* and *a vinculo*, by special act; nor for more than a century was there any other power known to the law by which a divorce of either kind could be brought about. In 1730, jurisdiction to pronounce a sentence of divorce, in cases of consanguinity and affinity, was conferred on the general court, composed of the governor and council (4 Hen. Stats. 245), which jurisdiction was, after the Revolution, by act of 1788 (12 Hen. Stats. 688), transferred to the superior court of chancery, and afterwards to the superior courts of law. This exercise of power by the legislature seems to have been in imitation of the British parliament, although, as being a *judicial act*, it was substantially pro-

hibited by the Constitution of 1776, which in the allotment of functions to the several departments of government, specially and expressly provided that *neither should exercise the powers belonging to another*. (Va. Const. 1776, Art. 3; 1 Tuck. Bl. (Pt. II.), 441, n. 19.)

The legislature was a very unsuitable body to which to commit the function of granting divorces, but it seems to have exercised its authority with commendable caution. In 1827, provision was first made by law to confer jurisdiction upon the *superior courts of chancery*, to hear and determine suits for the *dissolution* of marriage, for the causes of natural or incurable impotency of body at the time of the marriage, for idiocy and bigamy; and to grant divorces *a mensa et toro* for adultery, cruelty, and just cause of bodily fear; the legislature, however, still interposing in all other cases, and even in these, when it thought fit so to do. (Acts, 1826-'7, p. 21, ch. 23.) And in 1848, an act was passed which, after reciting that applications to the legislature for divorces *a vinculo matrimonii* are becoming frequent, and occupy much time in their consideration, and moreover, involve investigations more properly judicial in their nature, bestowed upon the *superior courts of chancery* jurisdiction to decree divorces *a vinculo* for adultery also; which was rather an impotent and narrow conclusion after so comprehensive a preamble. To this the revisal of 1849 added, as cause of divorce by the chancery court, sentence to the penitentiary for life, or for seven years or more. (Acts, 1847-'8, p. 165, ch. 122.) These acts, however, and especially the last but one, prepared the way for a judicious provision in the Constitution of 1851, which is found also in the Constitution of 1869 (Art. V. § 20), declaring that "the General Assembly shall confer on the courts the power to grant divorces, but shall not by special legislation grant relief." This constitutional provision made it needful to enumerate in detail all causes whatsoever, which should be sufficient under any circumstances to warrant a divorce *a mensa*, or from the *bond of marriage* respectively, the legislature having now no power to grant special relief; and the result was the very copious catalogue already set forth. (V. C. 1873, ch. 105, §§ 1, 3, 6, 7, 15; V. C. 1887, ch. 101, §§ 2254, 2257, 2258, 2266; *Ante*, pp. 284 & seq.)

4^g. The Effects of Divorce.

Let us consider the effect of divorce, (1), in England; and (2), in Virginia; and in both countries in the following several aspects, namely: (1), In respect to the legal capacities and incapacities of the parties; (2), In respect to the legitimacy of the issue; and (3), In respect to the estate of the parties;

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1^b. The Effect of Divorce in England;1ⁱ. In respect to the *Legal Capacities and Incapacities* of the Parties; w. c.1^k. Effect on the Legal Capacities and Incapacities of the parties, wrought by a Divorce *a Mensa et Toro*.

A divorce *a mensa, &c.*, does not, as we have seen, annul the relation of husband and wife; she is still a *feme covert*, and is under all the disabilities of coverture. She can make no contract binding on herself personally, cannot sue or be sued alone, and her property remains subject, as before, to her husband's control. On the other hand, the husband continues under his marital obligation to provide the wife with necessaries, although her power to charge him *as his agent* is much circumscribed, and for the most part ceases altogether. Neither party can marry again, and the husband's control of the wife's person is necessarily suspended as long as the separation continues. During that time, indeed, the cohabitation of the parties, without leave of the court, is regarded and punished as a contempt; and any issue which the wife may have is *prima facie* illegitimate, although that presumption may be repelled by proving the husband's access. (2 Bright's H. & Wife, 262; Bac. Abr. Marr. & Div. (F.1.))

2^k. Effect on the Legal Capacities and Incapacities of the Parties, wrought by a Divorce *a Vinculo Matrimonii*.

A divorce *a vinculo matrimonii* annuls the marriage, leaves both parties free to marry again, liberates the wife from the restrictions of coverture, and enables her to bind herself personally by contracts, and to sue and be sued without her husband. It discharges her freehold estate, her terms for years (her *chattels real*), and her *choses in action*, still unreduced into possession, from the husband's dominion and control, and relieves him of all obligation to supply her with necessaries. (2 Bright's H. & Wife, 364 &c.; 1 Bl. Com. 440, n. (29).)

2ⁱ. In Respect to the *Legitimacy of the Issue*; w. c.1^k. Legitimacy of the Issue in case of a Divorce *a Mensa et Toro*.

As the marriage is undissolved, it follows, of course, that the legitimacy of the issue previously begotten is in no wise affected; but it is presumed that the parties obey the sentence of the court which separates them, and do not afterwards cohabit; and hence, as we have seen, if the wife have children, which in the course of nature must have been begotten after the sentence, they are *prima facie* bastards, although, as above stated, the presumption may be repelled by proving that the husband

had access. (Bac. Abr. Marr. & Div. (F.): 2 Kent's Com. 127.)

2^k. Legitimacy of the Issue in Case of a Divorce *a Vinculo Matrimonii*.

It must be remembered that, in England, a divorce *a vinculo* is obtainable from the *courts* only for causes *existing at the time of marriage*, which make the connection an unlawful one from its inception. Such a divorce, therefore, *annuls* the marriage *ab initio*, and consequently bastardizes the issue. (1 Bl. Com. 440; Bac. Abr. Marr. & Div. (F.); 2 Bright's H. & Wife, 367.)

When a divorce *a vinculo*, for a supervenient cause (*e. g.*, *adultery*), is granted, as it must be by special act of parliament, the act ascertains the *whole law of the case*, as to the legal capacities of the parties, the effect on their property respectively, and the legitimacy of the issue.

3ⁱ. In Respect to the *Estate of the Parties*; w. c.

1^k Effect as to the Estate of the Parties of a Divorce *a Mensa et Toro*; w. c.

1^l. Effect, *Independently of any Special Order* of Court.

A divorce *a mensa*, &c., of itself operates nothing as to the property-interests of the parties. The marital rights of both remain unimpaired, *in statu quo*. (2 Bright's H. & Wife, 362, &c.)

2^l. Effect *by Special Order* of Court.

The courts of matrimonial causes in England are accustomed, in general, to accompany decrees of divorce *a mensa* with a decree for *alimony*. Alimony is the allowance made to a wife for her support out of her husband's estates. The amount is settled by the court, in its discretion, upon consideration of all the circumstances; allowing less where the husband has children to maintain, or when his income is derived from his personal exertions, and more where much of the property has come by the wife, where the income is derived from investments, or where she supports the children. In several instances one-third of the husband's income has been assigned, in some one-half, and in one only one-fifth. Where the husband is in fault, the court will not seek to find how light the burden may possibly be made, but what, under all the circumstances, will be a fair and just allotment. And when the wife has a separate and adequate income, or the divorce is on account of her adultery, or of her causeless or unjustifiable abandonment of her husband, alimony *may* be wholly denied. (1 Bl. Com 441; 2 Bright's H. & Wife, 357 & seq.; 1 Tuck. Com. 107, B. I.; 2 Bish. Marr. & Div. §§ 455 & seq.; Cooke v. Cooke, 2 Phil. (1 E. E. R.)

40; *Bailey v. Bailey*, 21 Grat. 57; *Carr v. Carr*, 22 Grat. 168, 173; *Harris v. Harris*, 31 Grat. 17 & seq.)

2^k. Effect as to the Estate of the Parties, of a Divorce *a Vinculo Matrimonii*; w. c.

1^l. Effect in Case of a Divorce *a Vinculo*, for a Cause Existing at the *Time of the Marriage*, in England.

It will be remembered that the common law (adopting the canon) allows a divorce from the bonds of marriage for no *supervenient* cause whatsoever, not even for *adultery*; but only for causes existing at the time of marriage (see *Ante*, p. 282, 2ⁱ). Hence, such a divorce in England, when granted *by the courts*, always annuls the marriage from the beginning, and consequently extinguishes all the marital rights of the parties in respect to the property of one another, whether *in presenti*, as the husband's claims to the wife's chattels, or *in futuro*, as the claim to dower, curtesy, or distribution. The only qualification to this general principle is that if, before the divorce for a cause which renders the marriage *voidable*, the husband has *bona fide*, and without *collusion* with the purchaser, disposed of the wife's chattels *for value*, regard to the interests of the innocent third person requires that she should have no remedy to recover them, at least against *him*. It would seem that she might recover their value of the husband. (1 Dyer, 13 a.; *Gremeley's Case*, 8 Co. 73 a.; *Cage v. Acton*, 1 Lord Raym. 521; *Aughtie v. Aughtie*, 1 Phill. (1 E. E. R.) 201; *Kelly v. Scott*, 5 Grat. 479; 1 Bl. Com. 440, n. (29); 2 Bright's H. & Wife, 364.)

2^l. Effect in Case of a Divorce *a Vinculo* for a Cause Supervening *After the Marriage*.

The common law, as has been said, admits of divorce *a vinculo* for no supervening cause, not even for *adultery*. The only mode of obtaining such a divorce for adultery, or other supervening cause, in England is, as we have seen, by *special act of parliament*, which itself determines, in each instance, the law of that case. (2 Bright's H. & Wife, 367.)

2^b. The Effect of Divorce in Virginia; w. c.

The effect of a divorce in Virginia is to be viewed in respect, (1), To the legal capacities and incapacities of the parties; (2), To the legitimacy of the issue; and (3), To the estate of the parties;

w. c.

1ⁱ. Effect of Divorce in Virginia, in Respect to the Legal Capacities and Incapacities of the Parties; w. c.

1^k. Effect as to the Legal Capacities and Incapacities of the Parties, of a Divorce *a Mensa et Thoro*; w. c.

1^l. Where there is no *Decree of Perpetual Separation*,

The effect is the same as in England. (*Ante*, p. 297, 1^k.)

2ⁱ. Where there is a *Decree of Perpetual Separation*.

Such decree of perpetual separation is expressly declared by statute to operate upon the personal rights and legal capacities of the parties, as a decree of divorce *a vinculo*, except that neither party can marry again during the life of the other. (V. C. 1873, ch. 105, § 13; V. C. 1887, ch. 101, § 2264; *infra*, 2^k.)

2^k. Effect, as to the Legal Capacities and Incapacities of the Parties, of a Divorce *a Vinculo Matrimonii*.

The effect in general is the same as in England. (*Ante*, p. 297, 2^k; 1 Tuck. Com. 100, B. I.)

However, in granting a divorce *a vinculo*, for *adultery*, the court *may* decree that the guilty party shall *not marry again*, in which case the bond of matrimony shall be deemed not to be dissolved as to *any future marriage* of such party; a restriction which the court may at any time afterwards for good cause remove. In all other particulars even the guilty party is wholly relieved of the incapacities and obligations of coverture. (V. C. 1873, ch. 105, § 14; V. C. 1887, ch. 101, § 2265; *Ante*, p. 289, 1^l.)

It has been made a question whether divorces granted under general or by special laws are not inhibited to the States, in respect to marriages previously entered into, as *impairing the obligation of contracts* (U. S. Const. Art. I., § x. 1); but the doubt seems sufficiently resolved by the considerations that the clause in question refers to no other contracts than such as relate to *property*, or *pecuniary value*, and that divorce laws do not impair the contract of marriage, but for the most part liberate one party because the contract *has been broken by the other*, or was not in the first instance entered into according to law. (Dartmouth Coll. v. Woodward, 4 Wheat. 629.)

2ⁱ. Effect of Divorce in Virginia in Respect to the Legitimacy of the Issue; w. c.

1^k. Legitimacy of the Issue in Case of a Divorce *a Mensa et Thoro*.

The same principles are applied as in England. (*Ante* p. 297, 1^k.)

2^k. Legitimacy of the Issue in Case of a Divorce *a Vinculo Matrimonii*.

There is no need to discriminate in Virginia as to the legitimacy of the issue, between divorces for causes existing at the time of the marriage, and divorces for supervenient causes; or between marriages which are *absolutely void*, without a sentence of divorce, and those

which are *voidable only*. The statute declares that "the issue of marriages deemed *null in law*, or *dissolved by a court*, shall nevertheless be legitimate;" thus wisely sacrificing logical consistency to a prudent and humane policy. (V. C. 1873, ch. 119, § 7; V. C. 1887, ch. 113, § 2554.)

3ⁱ. Effect of Divorce in Virginia in Respect to the *Estates of the Parties*; w. c.

1^k. Effect of a Divorce as to the *Estates* of the Parties, Independently of any *Special Order of Court*; w. c.

1^l. In Case of a Divorce *a Mensa et Toro*; w. c.

1^m. Where there is no *Decree of Perpetual Separation*.

The effect on the estate of the parties is the same as in England; that is, the parties remain, as to their property, *in statu quo*. (2 Bright's H. & Wife, 362; *Ante* pp. 298-9, 1^k.)

2^m. Where there is a *Decree of Perpetual Separation*.

Such decree shall, as we have seen, operate upon the property *thereafter acquired*, and upon the personal rights and legal capacities of the parties, as a decree for a divorce from the bond of matrimony, except that neither party shall marry again during the life of the other. (V. C. 1873, ch. 105, § 13; V. C. 1887, ch. 101, § 2264.)

2ⁱ. In case of a Divorce *a Vinculo Matrimonii*; w. c.

1^m. Where the Divorce is for a Cause Existing *at the Time of the Marriage*; w. c.

1ⁿ. Where the Marriage is Void *per se*, without Decree.

The union having never been *matrimonial*, but only *meretricious*, and always void, confers no rights of any kind, as to property or otherwise. The woman may reclaim whatever belonged to her, from the man or his assigns, in whose possession soever it may be, unless so far as she may have authorized the alienation of it; and no claim to curtesy, dower, or distribution can ever arise on either side. (Shelf. on Marr. & Div. 478; 1 Bl. Com. 436; 2 Bright's H. & Wife, 364.)

2ⁿ. Where the Marriage is *only Voidable*; w. c.

1^o. Where the Marriage is Avoided for Consanguinity, Affinity, Insanity, or Incurable Impotency.

The statute enacts that marriages prohibited by law on account of *consanguinity* or *affinity* between the parties, *if solemnized within this State*, or if solemnized out of the State between the parties who go out of the State for the purpose of being married, and with the intention of returning, and after marriage do return to and reside in this State, and

marriages solemnized within this State, when either of the parties was *insane or incapable from physical causes* of entering into the marriage state, shall be void from the time they are *so declared* by a decree of divorce or sentence of nullity, or from conviction of the parties under § 3783; that is, where the parties are within the prohibited degrees, or are one white and the other negro (V. C. 1873, ch. 105, § 1; V. C. 1887, ch. 101, §§ 2252, 2253; Id. ch. 185, § 3783); whereas, at common law, the marriage was in such cases void *ab initio* as soon as it was judicially ascertained to be illegal. Hence, as to *after-acquired* property, there can be no doubt that the marriage confers no rights in Virginia any more than in England. Neither can any marital right, touching property, exist which depends upon the continuance of the marriage; *e. g.*, the right to a distributive share on the part of either in the chattels of the other when deceased. But the divorce, it would seem, ought not *per se* to affect those rights of the consort, or of others claiming under the consort, which were fixed and vested before the divorce took effect, although to be enjoyed *in futuro*. Thus, if this view be correct, curtesy and dower, having attached by virtue of the marriage, would not be divested by the premature determination of the coverture, which is annulled not *from the beginning*, but only from the *date of the sentence*. The English cases, which seem to be of a contrary tenor, are not applicable here, because they suppose, what is always true in England, that every divorce *a vinculo* invalidates the marriage *ab initio*. (*Ante*, p. 299, 1st.)

It must be observed, however, that this suggestion, notwithstanding its apparent logical consistency, has been, in respect to curtesy, negatived by a decision of our court of appeals in *Porter v. Porter*, 27 Grat. 599; and as to dower, discredited in *Harris v. Harris*, 31 Grat. 33-'4. See also *Cralle v. Cralle*, 79 Va. 188.

In the first named of these cases (*Porter v. Porter*) it was held that a divorce *a vinculo*, even for a *supervening* cause (in that case adultery of the wife), defeats the husband's claim to curtesy *initiate* during the wife's lifetime, and by parity of reason, it would seem, to curtesy *consummate* also after the wife's death.

As to those things belonging to the wife which the husband has *bona fide* aliened for value, or

charged during the coverture, they are irrecoverably gone from the wife. It is so, as we have seen in England (*Ante* p. 299, 1^h), where, upon a divorce *a vinculo*, the marriage is annulled *from the beginning*, and it is a *fortiori* so in Virginia, in the state of the law above set forth. (2 Bright's H. & Wife, 364, &c.) Indeed, as to all chattels of the wife which come into the husband's possession during the coverture, it would seem that his title thereto at common law is so consummate and complete that it is not liable to be divested by any divorce *a vinculo* which does not annul the marriage *from the beginning*.

- 2^o. Where the Marriage is Avoided for any Other of the Causes *Existing at its Date*, which Render it *Voidable*.

The statute being silent as to the time whence a divorce *a vinculo* for those causes shall take effect, it is presumed that the common law analogy is to be observed, and as the causes existed at the time of the marriage, that the divorce invalidates it *from the beginning*. If it be so, then the same consequences follow, as to the estate of the parties, as in England. (*Ante* p. 299, 1^h.)

- 2^m. Where the Divorce *a Vinculo* is for a Cause Supervening After Marriage; w. c.

- 1ⁿ. Rights of Property *Actually Vested* in Possession, in Consequence of the Marriage.

These are unaffected by the divorce *per se*, although of course they may be by an accompanying order of the court. Thus, the wife's *chattels in possession*, having become (independently of the Married Woman's law) *vested absolutely* in the husband by the marriage, the subsequent divorce for a supervenient cause, as adultery, in no wise affects the husband's title.

- 2ⁿ. Rights of Property which are *Inchoate and Attached*, but not *Actually* in Possession.

These rights, it is believed, are also unaffected by the divorce, supposing no special order to accompany it. Thus, notwithstanding the dissolution of the marriage, the husband is still entitled to *curtesy*, and the wife to *dower*, save in *after-acquired* lands. (But see *Ante* p. 301, 1^o.)

- 3ⁿ. *Choses in Action* of the Wife.

These, if not reduced into actual or constructive possession before the coverture is dissolved by the divorce, *survive to the wife*. (1 Bl. Com. 440, n. (29); *Browning v. Headley*, 2 Rob. 340.)

4ⁿ. Rights which Relate to Property, but which *Depend on the Continuance of the Coverture*.

Of this kind is the right of one party, who survives, to be the *distributee* of the chattels of the other, being deceased, or to be *administrator* of the deceased; and such rights as these are supposed to be defeated by the divorce.

2^k. The Effect, as to the Estates of the Parties, of a Divorce *a Vinculo* or a *Mensa* Accompanied by *Special Orders*.

Upon decreeing the *dissolution* of a marriage, and also upon decreeing a divorce, whether *a vinculo* or *a mensa*, the court may make such further decree as it shall deem expedient concerning the *estate and maintenance* of the parties, or either of them. (V. C. 1873, ch. 105 § 12, V. C. 1887, ch. 101, § 2263.)

Our courts, in pursuance of this statute, are accustomed to accompany, not only divorces *a mensa*, as in England, but also those *a vinculo*, with decrees for *alimony*, the amount of which is determined by like considerations as we have seen prevail in England. (1 Bl. Com. 441; 1 Tuck. Com. 107; 2 Bish. Marr. & Div. § 369, and seq.; Cooke v. Cooke, 2 Phill. (1 E. E. R.) 40; Bailey v. Bailey, 21 Grat. 56, &c.; Carr v. Carr, 22 Grat. 173; Rees v. Rees, 3 Phill. (1 E. E. R.) 287; Burr v. Burr, 7 Hill (N. Y.), 207; *Ante*, p. 298, 2^l.)

5^g. Doctrine Touching Foreign Sentences of Divorce; w. c.

1^h. Doctrine in England.

The former narrow and illiberal doctrine of the English courts was that marriages solemnized in England could only be dissolved (so as to make the dissolution valid *in England*, or *by English law*) in accordance *with the law of England*. Hence, if parties were *married in England*, and then *removed their domicile* to Scotland, a divorce according to the law of Scotland was deemed not valid in England. In order to be valid there, the divorce, it was held, must conform to the requirements of English law, which was wholly opposed to the general rule prevailing in most other civilized countries, namely, that the validity of a divorce is determined by the *lex domicilii*, the law of the parties' domicile. It is, besides, violative of international comity. (Bac. Abr. Marr. & Div. (F.) 3; Stor. Confl. L., §§ 125, &c.; 2 Kent's Com. 116, 117.) But this doctrine appears to be no longer maintained by the English courts, (2 Kent's Com. (12 ed.) 117, n. (a); Warrander v. Warrander, 2 Shaw & McLean, 189; 9 Bligh. 89; 1 Bish. Marr. & Div. Introd. xvii.; 2 Do. § 181.)

2^b. Doctrine in Virginia as to Foreign Sentences of Divorce; w. c.

1^d. Doctrine in Virginia as to Foreign Divorces, Pronounced *Outside of the United States*.

The general doctrine of all civilized states, except England, and the doctrine strongly sanctioned by international comity, is that the validity of a divorce is regulated by the *lex domicilii*, the law of the place of the *actual bona fide domicile* of the parties. The proper courts of that place have jurisdiction to decree a divorce for any cause allowed by the local law, without reference to the law of the place of the original marriage, or of the place where the offence for which the divorce is allowed was committed. This doctrine is firmly established in the United States, and is substantially recognized in Scotland, and for the most part on the continent of Europe. (Stor. Conf. L. § 230 a; Id. §§ 221, &c.; 2 Kent's Com. 107, &c.; V. C. 1873, ch. 105, § 8; V. C. 1887, ch. 101, § 2259; Cheever v. Wilson, 9 Wal. 124.)

The domicile of the husband must, *in general*, be treated as the domicile of the wife, but not so as to oust of their jurisdiction the courts of the State where the parties were domiciled when the right to a divorce accrued; nor so as to deprive the injured wife of the protection of its laws, and of her right thereby to a divorce. The rule upon the subject, indeed, is that she may acquire a separate domicile whenever it is *necessary or proper that she should do so*. The right, on her part, springs from the necessity for its exercise, and endures as long as the necessity continues. The proceedings for a divorce in such cases may be instituted where the wife *has her domicile*. The place of the marriage and of the offence, and the domicile of the husband, are then of no consequence. (Cheever v. Wilson, 9 Wal. 124; 2 Bish. Marr. & Div. § 475; Barbee v. Barbee, 21 How. 582, 593.)

2^d. Doctrine in Virginia as to Foreign Divorces Obtained in *Other States of the Union*.

By the Constitution of the United States full faith and credit are to be given in each State to the public acts, records, and *judicial proceedings* of any other State; and this, by the supreme court of the United States, is held to attach to the judgment of the State court the same validity and effect in every other State in the Union, which it has in the State where it is rendered, provided the parties thereto *appear*, or be *personally* summoned, and there is no *fraud or collusion*. (Const. U. S. Art. IV., § i.; Hampton v. McConnel, 3 Wheat. 234; Mayhew v. Thatcher, 6 Wheat. 129; Mills v. Duryee, 7 Cr. 484; D'Arcy v. Ketchum, 11 How. 175; Christmas v. Russell, 5 Wal. 302.) And according to repeated judgments of the United States supreme court, even fraud or collusion in obtain-

ing the judgment is not available in a *court of law*, by way of plea, but recourse must be had to *equity*. (Christmas v. Russell, 5 Wal. 304-'5; Maxwell v. Stewart, 22 Wal. 81.) See also 2 Am. Dec. 46, note, where several State adjudications are cited to the same effect.

The propriety of this doctrine, however, is very strongly questioned in 7 Rob. Pr. 800 to 806, from which it would seem more consonant to sound reason and analogy, and better supported by authority, to hold that, as against a judgment in the same State, or in another State, the defence of fraud or collusion may be made *by plea* in a *court of law*.

Hence, if a divorce *a vinculo* be obtained in another State, *according to the laws thereof*, the defendant being *personally summoned*, and submitting to the jurisdiction, although *neither party be domiciled there*, and after a fair investigation of the merits (that is, an investigation without fraud or collusion), the sentence, it seems, must be received as having the same validity and effect everywhere in the United States, and amongst the rest in the State of the parties' actual domicile, as it had in the State where it is rendered. (2 Kent's Com. 108-'9; 1 Tuck. Com. (B. I.) 107-'8; Cheever v. Wilson, 9 Wal. 123.)

6^g. Sundry Matrimonial Causes Besides Divorce.

Let us see, (1), What are such matrimonial causes; and (2), The courts in which they are cognizable;

W. C.

1^h. What are such Matrimonial Causes.

The matrimonial causes, other than divorce, are (1), Suit for jactitation of marriage; (2), Suit for restitution of conjugal rights; and (3), Suit for alimony;

W. C.

1ⁱ. Suit for *Jactitation* of Marriage.

When one party gives out or boasts (*jactitat*) that he or she is married to another, whereby a common reputation of their marriage may ensue, it may be expedient to institute a suit, in order to inquire into the fact of the imputed marriage, upon the application of the party complaining; and if it appear that there has been no such marriage, to impose silence upon the *boaster*. Such a proceeding is called a suit for *jactitation* of marriage. Suits for jactitation of marriage, with other matrimonial causes, are submitted in England to the ecclesiastical courts, or since 1858, to the court for divorce and matrimonial causes. In Virginia no tribunal was provided for the determination of jactitation suits until the revival of 1849, when more comprehensive provisions for matrimonial causes than ever before existed were introduced into our code. The courts charged with this class of cases are the circuit and corporation courts on the

chancery side. (3 Bl. Com. 93; *Watson v. Rider*, 1 Lee, 15 E. E. R. 16; *Wescombe v. Dods*, Id. 59; *Duchess of Kingston's Case*, 20 How. St. Tri. 355; *Meadows & ux. v. Duchess of Kingston*, 2 Amb. 760; V. C. 1873, ch. 105, §§ 5, 8; Id. ch. 154, § 38; V. C. 1887, ch. 101, §§ 2256, 2259; Id. ch. 147, § 3055.)

But no suit for *annulling* a marriage or for divorce is maintainable, unless one of the parties has been domiciled in the State for at least one year preceeding the commencement of the suit; nor shall any suit for *affirming* a marriage be maintainable unless one of the parties be domiciled in this State at the time of bringing the suit. (V. C. 1887, ch. 101, § 2259.)

2^d. Suit for Restitution of Conjugal Rights.

Whenever either party *lives separate* from the other without sufficient reason, a suit may be instituted to compel cohabitation, if the party complaining is weak enough to desire it contrary to the inclination of the consort; and such a suit is called a suit for *restitution of conjugal rights*. But the only duty which in the nature of things is capable of being thus enforced is that of "*living together*." (3 Bl. Com. 94; 1 Bish. Marr. & Div. § 772; *Orme v. Orme*, 2 Add. (2 E. E. R.) 382; *Molony v. Molony*, Id. 249; 1 Hagg. C. R. (4 E. E. R.) 358, 363.)

It seems the better opinion that this jurisdiction does not exist in this country, unless conferred by statute; and as we have no statute in Virginia bestowing it in terms, it is supposed to be wanting in our system. The only relief, if any, which could be here obtained, is a decree for alimony, or of divorce for *desertion*. (1 Bish. Marr. & Div. §§ 772, 798, 799 & seq.; *Rhame v. Rhame*, 1 McCord's Ch. (S. C.) 197; S. C. 16 Am. Dec. 600.)

3^d. Suit for Alimony.

In England alimony, which means an allowance for the maintenance of the wife, is a *mere incident* to a decree of divorce *a mensa*, and it is generally granted, of course, by the same court, that is, the court christian, or, since 1858, by the court for divorce and matrimonial causes. There are instances, indeed, of the court of chancery enforcing a previous *agreement* to provide maintenance for a wife, and also of its decreeing maintenance as incidental to some other principal object within the scope of its powers; but the doctrine seems to be settled there that alimony is always an *incident only*, and that no court has any jurisdiction to give a wife a separate maintenance where it is the sole relief sought. (2 Burns' Eccles. L. 506 & seq.; Bac. Abr. Bar. & F. (H); 2 Stor. Eq. §§ 1422 & seq.; *Ball v. Montgomery*, 2 Ves. Jun. 191.)

In Virginia, not only is alimony granted as incidental to divorce of *either kind*, with the largest discretion, as we have seen (*Ante* p. 294, 1¹), as to the estates of the parties, but it may be granted by the court of chancery, independently of any divorce, or any application for one, as where the misconduct of the husband drives the wife from her home, or he turns her out of doors, or perhaps wherever a divorce from bed and board, or a restoration of conjugal rights would be decreed had they been asked for. (*Purcell v. Purcell*, 4 H. & M., 507; *Almond v. Almond*, 4 Rand. 662; *Spencer v. Ford*, 1 Rob. 648; 2 Bish. Marr. & Div. §§ 350 & seq.) But no alimony will be decreed to a wife who, without adequate reason, deserts her husband and refuses to live with him. Whilst she thus disregards her husband's comfort and happiness, her own duty, and the decencies of society, she has no right to demand of him a support in a separate establishment, and to concede it would be to reward misconduct, and would give a rude shock to the sanctity of the marriage contract. Nor is it an adequate cause for such desertion that the husband has behaved with too little tenderness and consideration; that he has been at times coarse, rude, and petulant when he should have been gentle, soothing, and affectionate; that he has left the wife to bear alone burdens and trials which it should have been his highest pleasure to share and relieve; or that he has been close, exacting, and penurious, when he should have been, to the extent of his means, open-handed, liberal, and generous. (*Carr v. Carr*, 22 Grat. 173, 175; *Latham v. Latham*, 30 Grat. 338-'9; *Harris v. Harris*, 31 Grat. 32.)

Alimony being a proportion of the husband's estate allowed to the wife for her maintenance during the period of their separation as husband and wife, ceases with the death of either party, (2 Bish. Marr. & Div. §§ 363, 436, 438; *Francis v. Francis*, 31 Grat. 289.) But the arrears of alimony which has been previously decreed, which remain unpaid at such death, are recoverable against the husband or his estate. (*Francis v. Francis*, 31 Grat. 289-'90.)

The various questions connected with alimony cannot be here discussed. It must suffice to say that, as upon the marriage the husband has vested in him, at common law, all the present available means of the wife, together with the right to claim her future earnings and acquisitions, so the law casts upon him the duty suitably to maintain her according to his ability and condition, a duty he cannot renounce; so that when the law in any case judges that the parties may be separated for her protection, or that otherwise the intervention of the court

is requisite in consequence of *his wrong-doing*, it must also judge that he shall maintain her while such a state of things continues. It may be added, also, that in cases of divorce it is common to distinguish between the *temporary alimony*, granted during the continuance of the suit, when the merits are as yet undetermined, and the *permanent alimony* allowed at its close, the latter being in amount always greater than the former. (2 Bish. Marr. & Div. §§ 458 & seq., 462, 467.) And although at present, by statute in Virginia (V. C. 1887, ch. 103, §§ 2284 & seq.), the husband derives no benefit, during the coverture, from his wife's property, the whole of which is by that statute declared to be and to continue her separate and sole property, not subject to his disposal, nor liable for his debts; yet the doctrine is believed to remain unchanged that he is liable *for her support*.

The *amount* of alimony to be allowed is matter of discretion with the court, not, however, an arbitrary, but a judicial discretion, to be exercised according to established principles, and upon a view of all the circumstances of the case. The general rule, especially in respect to permanent alimony, is that the wife is entitled to a support corresponding to her husband's condition in life, and his fortune and resources, including his and her earnings, or ability to earn money. Ordinarily, it is said, the wife ought to be allowed, for *temporary* alimony, about *one-fifth* of the joint income, as just defined, and for *permanent* alimony, from one-third to one-half, two-fifths being no uncommon proportion. (2 Bish. Marr. & Div. §§ 463 & seq.; Id. §§ 455 & seq., 457 & seq.; Bailey v. Bailey, 21 Grat. 52 & seq.; Francis v. Francis, 31 Grat. 285, 289; Harris v. Harris, 31 Grat. 16 & seq. See Carr v. Carr, 22 Grat. 168.)

2^b. The Courts in which these Several Matrimonial Causes are Cognizable; w. c.

1^a. The Courts in England.

They are in general, at common law, the *ecclesiastical courts*, except, perhaps, that in a few cases of previous agreement, or as incident to other equitable relief, alimony is decreed by the court of chancery. But since 1858, by Statute 20 & 21 Vict., c. 85, amended by certain subsequent statutes, matrimonial causes have been transferred as we have seen to a new court, called "The Court for Divorce and Matrimonial Causes," which may exercise, in respect to alimony, even a larger jurisdiction than belonged, at common law, to the ecclesiastical courts. (Wms. Pers. Prop. 360.)

2^a. The Courts in Virginia.

The courts in Virginia which have cognizance of matri-

monial causes are, when the marriage is a *crime*, the county and corporation courts, (*Ante*, p. 293); when not a crime, or when relief is sought by one of the parties, they are the *circuit and corporation courts*, on the chancery side. These courts have jurisdiction "of suits for annulling or affirming marriages, whose validity is denied or doubted, or for divorces," with ample incidental powers to provide for the maintenance and security of the wife, the custody of minor children, and the disposition of the estates of the parties. Hence, it seems that these courts may not only decree alimony (as to which there can be no doubt), but may also intervene to determine any question as to the validity of marriage, raised either by denying or affirming it, but it is believed not to *compel the parties to cohabit*. (V. C. 1873, ch. 105, §§ 8, 4, 5, 10, 12, 13; V. C. 1887, ch. 101, §§ 2259, 2255, 2256, 2261, 2263, 2264; Purcell v. Purcell, 4 H. & M. 507; Almond v. Almond, 4 Rand. 662; *Supra*, pp. 307-309.)

4°. The Legal Consequences of Marriage.

In order to determine the legal consequences of marriage, we may advert to, (1), The effect of marriage as between husband and wife themselves; (2), The effect of marriage as to third persons; and (3), Contrast of the sexes in respect to their several rights and privileges;

W. C.

1°. Effect of Marriage as *Between Husband and Wife Themselves*.

The effect of the marriage as between husband and wife themselves, relates to the effect, (1), In respect to the *persons* of husband and wife; and (2), In respect to the *property* of the parties;

W. C.

1°. Effect of Marriage *in Respect to the Persons* of Husband and Wife.

By marriage, husband and wife *become one person* in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that of the husband. Upon this union of person, as has been before observed, depends almost all the legal rights, duties, and disabilities which belong to either by reason of the marriage. (1 Bl. Com. 442.)

Let us consider, (1), The duties of husband to wife; (2), The duties of wife to husband; and (3), The doctrine as to deeds of separation;

W. C.

1^h. Duties of Husband to Wife.

Independently of his obligation to pay her ante-nuptial debts, to maintain her, and to answer for her torts (which refer themselves rather to the next head, of *property*), the

husband's duties are summarily expressed in the vow he makes in marriage, namely, to "love her, comfort her, honor, and keep her, in sickness and in health, and, forsaking all others, to keep only unto her so long as they both shall live." The law cannot, indeed, in the nature of things, enforce the observance of these duties, save in a very imperfect manner; but it recognizes them as duties, and gives no countenance to the doctrine that they may be evaded at the pleasure of either or both of the parties. They cannot, as Sir Wm. Scott observes, by private contract dissolve the solemn tie which binds them, and throw themselves upon society in the undefined and dangerous character of a wife without a husband, and a husband without a wife. (*Evans v. Evans*, 1 Hag. C. R. 4 E. E. R. 35, 120.)

It is the husband's duty, as the stronger party, to practice the greater forbearance, and to persevere in employing it, despite turbulence of temper, petulance of manners, and infirmity of body or mind. "Where they occur," says that great judge, "their effects are to be subdued by management, if possible, or submitted to with patience; for the engagement was to take *for better, for worse*; and painful as the performance of this duty may be, painful as it certainly is in many instances, which exhibit a great deal of the misery which clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class and importance." (*Evans v. Evans*, 1 Hag. C. R. 4 E. E. R. 35, 120.) And so a greater than Sir. Wm. Scott enjoins: "Husbands, love your wives, *and be not bitter against them.*" (Coloss. iii. 19.)

2^b. Duties of Wife to Husband; w. c.

1^a. What are the Duties Owing by Wife to Husband.

The wife's duties to the husband are also fairly expounded in *her* marriage vow, namely, to "obey him and serve him, love, honor, and keep him, in sickness and in health; and forsaking all others, to keep only unto him, so long as they both shall live." And directly to the same effect is the divine precept: "Wives submit yourselves unto your own husbands, as it is fit in the Lord." (Coloss. iii. 18.)

2^a. The Husband's Power of Correction.

Modern refinement affects to be shocked at the power given by the common law to the husband over the wife, and certainly the ungentle exercise of his authority may well excite, as it does, the strongest indignation of society. But when it is considered that the husband is liable in damages for all his wife's *torts*, whether of tongue or hand, and can in no way escape from such responsibility,

however little he may sympathize with, or even though he be ever so much opposed to the wrong, it is not unreasonable to commit to him a large latitude of control and restraint, especially as public opinion, and even the guardians of the law, are ever watchful to prevent his transgressing the limits assigned him. The best common law authorities affirm that "the husband hath by law power and dominion over his wife, and may keep her *by force* within the bounds of duty, and may beat her, but not in a violent or cruel manner; for in such case, or if he but *threaten* to beat her outrageously, or use her barbarously, she may bind him to the peace, or may obtain a divorce, *propter sævitiam*." It must be owned, however, that it is the part of practical wisdom for English and Virginian husbands to forbear the exercise of this portion of their marital authority. (1 Bl. Com. 445-6; Bac. Abr. Bar. & F. (C.); 1 Bish. Marr. & Div. §§ 754 &c.)

3^h. Doctrine Touching Deeds of Separation of Husband and Wife.

The discussion of the doctrine touching deeds of separation will include the explanation of, (1), The nature of deeds of separation; (2), The validity of such deeds; (3), The effect on such deeds of renewed cohabitation; (4), The effect of such deeds as to the custody of the children; (5), The effect of such deeds as to the adultery of either consort;

W. C.

1¹. The Nature of Deeds of Separation.

Deeds of separation are deeds whereby it is covenanted between the husband and wife, or more properly between the husband, on the one side, and a *trustee for the wife*, on the other, that the husband shall, on his part, provide a stipulated competency for the wife, and that the trustee shall, on his part, indemnify the husband against all debts which she may contract during the contemplated separation; that the husband and wife shall live separately, and that neither will exact or sue for a restitution of conjugal rights.

For the most part, they contemplate a *present separation*, upon the ground of existing dissensions; but sometimes parties have been so extremely provident as to make arrangements, by means of such deeds, for *future differences*.! (2 Bright's H. & Wife, 306; 1 Tuck. Com. (B. I.) 108-'9; St. John v. St. John, 11 Ves. 530 & seq.; Westmeath v. Westmeath, 1 Jac. (4 Eng. Ch.) 135 & seq.; Durant v. Titley, 7 Price, (3 Eng. Excheq.), 577; Carson v. Murray, 3 Pai. (N. Y.) 483, 500; Shelthar v. Gregory, 2 Wend. (N. Y.) 422.)

21. The Validity of *Deeds of Separation*, and the Enforcement thereof.

Many cases occur in the English books founded upon the idea that, by the mutual consent of the parties expressed in deeds of separation, the coverture may, for many purposes, be dissolved, especially in respect to the obligation to cohabit, the personal incapacities of the wife, and the authority vested by the marriage in the husband; and that whether the covenants contained in the deed were between the husband and wife alone, or between the husband and a trustee for the wife. Thus these cases, as far as their authority extends, would, singularly enough, permit this most important relation — of which the common law is so tender that when legally contracted it esteems it indissoluble, even in the discretion of the most reverend judges, for any supervenient cause whatsoever — to be virtually terminated as to its most essential incidents by the mere private consent of the parties themselves; and not only by a consent given *in presenti*, in view of existing dissatisfactions, but also by a consent given *in advance*: a consent to put asunder, upon some stipulated contingency, those whom God hath joined! (Moore v. Moore, 1 Atk. 277; Lister's Case, 1 Stra. 478; Mead's Case, 1 Burr. 542; Vane's Case, 13 East, 171, note.)

This doctrine which the ecclesiastical courts have persistently combated, has more recently been so limited as to be shorn of its most pernicious consequences. Thus the covenant is admitted to be wholly without legal effect if it be between the husband and wife *alone*, she having no capacity to contract with anybody, and above all not with him. Then, although the agreement be between the husband and a *trustee*, it does not restore to the wife any of the capacities of which coverture deprived her; nor does it bar a suit for the restitution of conjugal rights, nor deprive the husband of his marital control of the wife's person, if, notwithstanding the covenant to the contrary, he chooses to exert it, although doubtless an action on the covenant would lie for the trustee against the husband for any breach of its stipulations. Covenants for *future separation*, at the pleasure of either party, are by these latter cases held *to be void*, as of evil tendency, although, unhappily, it seems that such covenants may be supported if the future separation is to receive the *sanc-tion of the trustees*. And in short, deeds of separation, even *in presenti*, are now regarded as valid only in respect to the *property arrangements* which they contemplate, and annul or impair no other of the marital rights and obligations than such as relate to *property*; and it is as

to property arrangements alone that such deeds are specifically enforced in equity; and that as to the husband only, who, being *sui juris*, may enter into such engagements as he shall see fit; but not as to the wife, who, as we have seen, loses none of her conjugal incapacities in consequence of any actual or projected separation, unless, in respect to her *separate estate*, as to which she may sometimes contract as if she were a *feme sole*. (2 Stor. Eq. § 1428; 1 Bish. Marr. & Div. §§ 631, 637; Marshall v. Rutton, 8 T. R. 545; Legard v. Johnson, 3 Ves. Jr., 352; St. John v. St. John, 11 Ves. 526; Worrall v. Jacob, 3 Meriv. 255, 268; Durant v. Titley, 7 Price. (3 Eng. Exch.) 577; Hindley v. Westmeath, 6 B. & Cr. (13 E. C. L.) 200; Cocksedge v. Cocksedge, 14 Sim. (37 Eng. Chan.) 244; Rodney v. Chambers, 2 East. 283; Jee v. Thurlow, 2 B. & Cr. (9 E. C. L.) 551; Walker v. Walker, 9 Wal. 750, &c.; Switzer v. Switzer, 26 Grat. 578 & seq.; Harshberger v. Alger, 31 Grat. 60, 61.)

An agreement for a separation can in no case be sustained unless it clearly appear that in the negotiation which preceded it, as well as at the time of executing it, the wife was in a position to act, and did act, not only with perfect freedom, but with a full knowledge and appreciation of all the circumstances of her situation, and of her individual and marital rights; and the contract itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties, had the case fallen under its jurisdiction. (Switzer v. Switzer, 26 Grat. 582.)

3^d Effect on Deeds of Separation, of *Renewed Cohabitation*.

The effect of renewed cohabitation, whether it arise from voluntary reconciliation, or from the coercion of the court, is for the most part to put an end to the stipulations of the deed of separation, the *status* contemplated by it no longer existing, although whatever permanent provisions touching property may be contained therein, which do not depend exclusively upon a separation, will of course continue valid, and may be enforced, especially where third persons are interested in them. (2 Bright's H. & Wife, 319-20; Fletcher v. Fletcher, 2 Cox, 105; Worrall v. Jacob, 3 Meriv. 268; Walker v. Walker, 9 Wal. 752.)

4th. Effect of Deeds of Separation *as to the Custody of the Children*.

It seems that the father, to whose charge the law primarily assigns the custody and care of the minor children, cannot transfer his responsibility and duty to another, not even to the mother; and that a stipulation to do so will in general be void, as against public policy. (St. John v. St. John, 11 Ves. 538; Villa Real v. Mellish,

2 Swanst. 537 '8.) The only way in which such transfer of the custody and care of a minor child can be effected, is by a contract of *apprenticeship*, which must be, at common law, by deed, and in Virginia by writing, to which the child must be a party, and if the child be under the age of fourteen, there must be the consent, entered of record, of the court of the county or corporation where he resides. (*Ante*, pp. 199-200.)

5^l. Effect of Deeds of Separation in Respect to the Adultery of either consort.

The ordinary provisions of deeds of separation stipulate that the parties, and especially the wife, may live where and with whom they may severally think fit; but this is not to be construed as signifying the consent of either consort that the other may live in adultery, and if either be guilty of it, the aggrieved party may demand a divorce, just as if the deed of separation had never existed. (2 Bright's H. & W. 317 '18.)

2*. Effect of the Marriage in Respect to the Property of the Parties.

The effect of marriage in respect to the property of the parties, respectively, is to be considered, (1). In regard to *contracts* and other transactions occurring between husband and wife *before marriage*; (2), With regard to contracts and other transactions between husband and wife occurring *during coverture*; and (3), With regard to the *property of each consort*, in respect to the other;

W. C.

1^h. Effect of Marriage with Regard to *Contracts* and other Transactions between Husband and Wife *Occurring before marriage*; W. C.

1ⁱ. The General Doctrine.

If a man and a woman enter into any contract together, whether to pay money or to do a collateral thing, and afterwards intermarry, the contract is in general thereby discharged; because the existence of the wife is then merged in that of her husband, and they are in law, for most purposes, *one and the same person*. Hence, if two men enter jointly into a contract with a woman, and one of them afterwards marries her, the contract is discharged as to the husband, and consequently as to the other also, since it can only be enforced as it was made,—that is, *jointly*; and as by the marriage the husband is released, it is no longer enforceable against the other contractor. (1 Bl. Com. 442, n. (40); 1 Bright's H. & Wife, 18; Bac. Abr. Bar. & F. (E).) And this doctrine is understood to be in no wise impaired by the statute, (V. C. 1873, ch. 141, §§ 14, 15; V. C. 1887, ch. 134, §§ 2856, 2857), allowing a creditor to *compound or compromise* with a joint

contractor or co-obligor, and to release him from liability without impairing the contract or obligation as to the other joint parties, that provision appearing clearly to refer to *express* releases, and not to those arising by construction of law. (See V. C. 1873, ch. 143, § 5; V. C. 1887, ch. 136, § 2891.)

2ⁱ. Exceptions to the General Doctrine; w. c.

1^k. Contracts to be Performed *after the Coverture is Determined*.

If a bond binds not the obligor himself, but *his executors*, to pay money to a woman whom he afterwards marries, the marriage does not impair the force of the bond. And so, in short, all contracts which by their stipulations are not to be performed until the coverture is terminated, are valid and obligatory, notwithstanding the subsequent intermarriage of the parties. (1 Bl. Com. 442, n. (40); 1 Bright's H. & Wife, 19, 20; Bac. Abr. Bar. & F. (E.); Cage v. Acton, 1 Ld. Raym. 515; Milbourn v. Ewart & als., 5 T. R. 384.)

2^k. Contracts Made *in Contemplation of Coverture*.

Contracts to settle money or property upon the consort, or any other arrangements of like nature, made *in contemplation of and with a view to marriage*, although they are discharged *at law* by the subsequent marriage, yet are sustained and enforced *in equity*, according to the intent of the parties and the justice of the case, which equity will not permit to be defeated by the technical assumption of the unity of husband and wife. (1 Bl. Com. 442, n. (4); 1 Bright's H. & Wife, 19; 2 Stor. Eq. §§ 1370-71; Bac. Abr. Bar. & F. (E.); Cannel v. Buckle, 2 P. Wms. 243; Watkyns v. Watkyns, 2 Atk. 97; Acton v. Pierce, 2 Vern. 480, and Cases, n. (1).)

3^k. Contracts Made by One or Both of the Parties *in a Representative Character; e. g., as Executor, &c.*

Contracts between a man and a woman, made *in auter droit* by either, as, for example, as *executor*, etc., are not discharged, even at law, by the subsequent intermarriage of the parties. Such a construction would work a *devastavit*, or wasting of the estate committed to the executor, etc., contrary to the maxim that the law, by its implications, never works a wrong, *actus legis nemini facit injuriam*. (1 Bright's H. & Wife, 21 & seq.; Broom's Max. 89; Needham's Case, 8 Co. 136 a; Waukford v. Waukford, 1 Salk. 306.)

4^k. Contract made before Marriage by one Consort *with a Trustee for the Other*.

The promise in this case being made, not to the consort, but to the *trustee*, in whom consequently the *legal title* to the benefit of the contract vests, the technical

reason for the discharge operated in other instances by the subsequent marriage ceases, and the contract, notwithstanding such marriage, is good even at law; but it has been suggested, with reason, that it will be invalidated in equity when not executed *in contemplation of marriage*. And if, at common law, a contract with the consort's trustee, not in contemplation of marriage, would thus be invalidated in equity, a similar conclusion must, *a fortiori*, prevail in Virginia, where a promise or covenant *for the benefit of another* is suable even in a court of law in the beneficiary's own name. (1 Bright's H. & Wife, 21; V. C. 1873, ch. 112, § 2; V. C. 1887, ch. 107, § 2415.)

- 2^b. Effect of Marriage with Regard to *Contracts* and other Transactions between Husband and Wife *Occurring During Coverture*.

The transactions which may thus occur between husband and wife during coverture may be classed under the heads of, (1), Conveyances by husband to wife, and *vice versa*; (2), Executory contracts as between husband and wife *during coverture*; (3), Testamentary dispositions by either consort in favor of the other; and (4), Marriage Settlements;

W. C.

- 1ⁱ. Conveyances by *Husband to Wife*, and *Vice Versa*.

Conveyances by the husband to the wife are usually and most appropriately made to *trustees* in trust for the consort, and in that form such transactions have been familiar ever since the introduction of uses and trusts, in the latter part of the reign of Edward III. (about A. D. 1370). But for considerably more than a century past the courts of equity have maintained conveyances *directly* from the husband to the wife, without the intervention of any trustee. What is to be said on this topic, therefore, may be referred to the two heads just indicated, namely, (1), Conveyances by husband to trustee for wife, and *vice versa*; and (2), Conveyances by husband directly to the wife, and *vice versa*;

W. C.

- 1^k. Conveyances by *Husband to Trustee for Wife*, and *vice versa*.

Conveyances by the husband to a trustee for the wife have been freely admitted, as above observed, from the first introduction of trusts, with no other proviso than that creditors of the grantor, and subsequent purchasers for value and without notice, shall not be thereby prejudiced. The *legal title* being by such conveyance vested in the trustee, any suit touching the property must, in a *court of law*, be in the trustee's name; but as the *equita-*

ble title is in the consort as *cestui que trust*, or beneficiary, his or her rights, if invaded, may be asserted in a court of equity, even as against the other consort. If it be the wife who in such case has occasion to ask the aid of the court, she sues under the protection of her *prochein ami*, or next friend, who is usually her husband, unless his interest is adverse to her's, and in that case it may be any one whom the court shall approve, who may be willing to act in that capacity. (1 Th. Co. Lit. 130; 2 Stor. Eq. § 1380; 3 Rob. Pr. (2d ed.) 229-'30.)

When the wife proposes to convey her maiden lands to her husband, the object cannot well be accomplished, nor probably accomplished at all, except by the husband and wife uniting, in pursuance of the statute (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502) in a conveyance of the land to a third person (who is virtually a trustee, whether declared to be so or not), who conveys it to the husband, in whom is thus vested a complete title, indefeasible in equity, as well as at law. (Shepperson v. Shepperson, 2 Grat. 501; Jackson v. Stevens, 16 Johns. (N. Y.) 113; McCartee v. Orphan Asylum, 9 Cow. (N. Y.) 437; Scarborough v. Watkins, 10 B. Monr. (Ky.) 500.) But if, in the arrangement between the husband and wife, which is consummated by the conveyance, there be any material inequality, any gross inadequacy of consideration, where a consideration was contemplated, or any fraud, oppression, or unfair advantage as respects the wife, the deed does not impart in a court of equity any additional validity to the transaction. Indeed, as the union of husband and wife as grantors is necessary to make a conveyance operative under the statute, it is manifest that there is an incongruity in the husband being himself the grantee therein, either directly or through the medium of an *express* trust. The wife being thus deprived of the protection of her husband in the conveyance, which the law designed to give her, the transaction is regarded with some jealousy, and is watched narrowly if any circumstance of suspicion appears. (Switzer v. Switzer, 26 Grat. 582-3; 1 Bish. Marr. Wom. §§ 604, 713.)

These conveyances ought always to be registered according to the statute of registry. (V. C. 1873, ch. 114, § 6; V. C. 1887, ch. 109, §§ 2465, 2466.) The claims of subsequent purchasers are thereby in all cases precluded, the registry being constructive notice to them; and so also are those of creditors, provided the conveyance is founded on a *valuable consideration*, and is not tainted with any collusion between husband and wife to defraud creditors. When made in pursuance of an *ante-*

nuptial contract, the marriage has hitherto been deemed a valuable consideration, at least in respect to the wife and the children of the marriage, but it is not so, by the Code of 1887, as to creditors whose debts had been contracted at the time of the conveyance; and so also, though there be no ante-nuptial agreement, the relinquishment of the wife's contingent claim of dower, or of her equitable *choses in action*, is a valuable consideration; and so, of course, is any *directly* valuable consideration which the wife herself or her friends can furnish. (2 Lom. Dig. 434 & seq.; 2 Min. Insts. 609 & seq.; Cronie v. Hart & als. 18 Grat. 744; V. C. 1873, ch. 114, §§ 1, 2, 6; V. C. 1887, ch. 109, §§ 2458, 2459; Id. ch. 109, § 2466; Herring v. Wickham, 29 Grat. 628; Triplett v. Romine, 33 Grat. 655-'6 & seq.)

2^k. Conveyance *by Husband Directly to Wife, and Vice Versa.*

It is the established doctrine of the common law, as administered in the *courts of law*, that a man can grant nothing to his wife, nor she to him, nor can they enter into any contract, the one with the other; for the grant would be to suppose her separate existence, and the contract with her would be only a contract with himself. (1 Bl. Com. 442; 2 Bright's H. & Wife, 29; 1 Th. Co. Lit. 130-'31.) A remarkable qualification of this general doctrine is mentioned by Coke. (2 Th. Co. Lit. 531.) If a feme disseisor, says he, make a feoffment to A for life, and then taketh husband the disseisee, and he releaseth to A *all his right*, this shall enure to B, and to *his own wife* also; for by the rule of Littleton, it must enure to all in the remainder. In truth, according to Hawkins, it enures by way of *extinguishment* of the husband's right, without passing it to the wife, so that she takes *by construction of law*. (Hawk. Abr. 394.)

Whilst the rule of the common law, as expounded in the *law courts*, is thus rigorous, it is possible, by means of a conveyance, operating under the *Statute of Uses* (27 Hen. VIII. c. 10; V. C. 1873, ch. 112, § 14; V. C. 1887, ch. 107, § 2426), for a husband to transfer land directly to his wife, although here also it is *by construction of law*. Thus, if a husband covenant with a *third person*, in consideration of *love and affection* for his wife, to stand seised of certain land *to her use*, the statute of uses will transfer the *possession* from him to her. And so upon principle, it would seem, it ought to be if the husband should bargain with a *third person*, for *valuable consideration*, to stand seised to his wife's use. (1 Th. Co. Lit. 130, 132, n. (9); 2 Lom. Dig. 24-'5.)

The courts of equity, for more than a century, as be-

fore remarked, have discarded the *necessity* for trustees (however they may allow the convenience), in conveyances from husband to wife, and have supported them when made *directly* by him to her, wherever they do no wrong to his creditors, or to subsequent purchasers from him for value and without notice; but with this qualification, that he shall not, in an excess of uxoriousness, deprive himself of the whole, nor even of an unreasonable proportion of his estate (she being entitled only to a provision out of the same), unless, indeed, in case of some strongly *meritorious consideration* apart from the mere conjugal relation. The settlement of the husband's *whole estate* may, under such peculiar circumstances, be sustained in equity. (1 Bright's H. & Wife, 33; 2 Stor. Eq., §§ 1374 & seq.; Beard v. Beard, 3 Atk. 72; Shepard v. Shepard, 2 Johns. C. R. 57; Jones v. Obenchain, 10 Grat. 259.)

Equity, in conveyances of this kind, made *directly* from husband to wife, regards the husband as in fact the wife's *trustee*, and whilst the transaction is void *at law*, maintains the wife's rights as effectually as if a third person trustee had been interposed. The evidence, however, must be clear and satisfactory, not only that the husband designed to bestow the property upon her, but that he divested himself of it, and distinctly agreed to hold it as trustee for the wife. (McLean v. Longlands, 5 Ves. 79; Walter v. Hodge, 2 Swanst. 106-7; *Post*, p. ; 2 Stor. Eq. § 1380; Lucas v. Lucas, 1 Atk. 271; Bletson v. Sawyer, 1 Vern. 244; Slanning v. Style, 3 P. Wms. 338; Jones v. Obenchain, 10 Grat. 259.)

The most prominent instances where equity has applied the doctrine under consideration, by giving effect to gifts from husband to wife, without the intervention of a trustee, are—

(1), Conveyances direct from him to her, of lands, stocks, money, etc., as illustrated by the cases of Lucas v. Lucas, 1 Atk. 271; Walter v. Hodge, 2 Swanst. 104 & seq.; Case of Countess Cowper, 3 Atk. 393; McLean v. Longlands, 5 Ves. 71; Rich v. Corkell, 9 Ves. 375; Jones v. Obenchain, 10 Grat. 259; 2 Stor. Eq. §§ 1374-5; and

(2), Gifts of *savings of pin-money*, or of house-keeping allowance, of trinkets, etc., as illustrated by Slanning v. Style, 3 P. Wms. 338; Countess Cowper's Case, cited Graham v. Londonderry, 3 Atk. 393; 2 Stor. Eq. § 1375.

2ⁱ. Executory Contracts, as between Husband and Wife, *during Coverture*; w. c.

1^k. Doctrine in *Courts of Law*.

Contracts executory between husband and wife, made *during coverture*, are *at law* always nullities, there being

a positive incapacity in each to contract with the other. (1 Th. Co. Lit. 130; 2 Stor. Eq. § 1372.)

2*. Doctrine in *Equity*.

In courts of equity, executory contracts between husband and wife, made *during coverture*, are in a few instances enforced, but only, it is believed, when they relate to her *separate estate*; as for example, where she, in good faith, and for a reasonable consideration, agrees to make him, out of her separate property, a certain allowance; or he agrees to repay money lent by her out of her separate estate; or that she shall separately enjoy property bequeathed to her; or where he agrees to settle property on her in consideration of her relinquishment of her dower-interest in his lands, etc. (2 Stor. Eq. §§ 1372-'3.)

3i. Testamentary Dispositions *by either Consort in Favor of the Other*.

Testamentary dispositions, as they do not take effect until after the coverture is terminated by death, are allowed without qualification on the part of the husband (saving the rights of creditors), and on the part of the wife also, as to her *separate estate*, or by virtue of a *power of appointment*. Upon this principle a *donatio mortis causa* is valid as between husband and wife. (1 Bl. Com. 442, and n. (41); 2 Kent's Com. 129; 1 Lom. Ex'ors, 467-'8; West v. West's Ex'ors, 3 Rand. 363; V. C. 1873, ch. 118, § 3; V. C. 1887, ch. 112, § 2513; Lawson v. Lawson, 1 P. Wms. 441; Miller v. Miller, 1 P. Wms. 356.)

4i. Marriage Settlements.

Marriage has always hitherto been esteemed a *valuable consideration* to support either a promise or a grant, and surely upon just and reasonable grounds. (2 Min. Insts. (609), 683.) But it is provided by the Code of 1887, that a gift or conveyance "which is *upon consideration of marriage*, shall be void *as to creditors* whose debts shall have been contracted at the time it was made." (V. C. 1887, ch. 109, § 2459.)

Actual marriage settlements, made before coverture, commonly employ the intervention of *trustees*; but whether there be trustees or not, or whether it be an actual settlement or merely an ante-nuptial contract for one, the rights of the wife under it are enforced and protected in a court of equity; but not so as to divest the husband's marital rights to a greater extent than the terms of the instrument *clearly require*. Nay, although there be no *ante-nuptial* agreement, yet if there be a valuable consideration, and if the claims of creditors, and of subsequent purchasers for value and without notice, do not stand in the way, such a settlement is still valid.

(2 Kent's Com. 172 & seq.; *Ante p.* 317, 1^k; Kesner v. Trigg, 8 Otto, (98 U. S.) 54; Bullard v. Briggs, 7 Pick. (Mass.) 533; Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 537; Woodson v. Perkins, 5 Grat. 345; Mitchell v. Moore & als. 16 Grat. 275; Gosden & ux. v. Tucker's Heirs, 6 Munf. 1; 1 Tuck. Com. 111, B. I.; Buck & als. v. Wroten & ux. 24 Grat. 250.) Hence, if a married woman relinquishes her claim for dower on the faith of a settlement of other property made, or *agreed to be* made, by her husband, such settlement will be held good, to the extent of a just compensation for the interest so relinquished. (Burwell's Ex'or v. Lumsden, 24 Grat. 443; Davis v. Davis, 25 Grat. 590; Johnston v. Gill, 27 Grat. 591.)

Marriage settlements, like all other conveyances of property, ought to be as accurate and definite as possible in describing the property, so that it may be clearly identified and distinguished. Such specification is particularly needful in respect to personal chattels, although it is not yet determined how minute the specification must be. Perhaps all that at present can be said in respect to the want of a specification is that it is a *circumstance of suspicion*. (1 Tuck. Com. 111-'12, B. I.; Eckhols v. Graham, 4 Call. 494; Galt. & al. v. Carter, 6 Munf. 249-'50; Jarman v. Woolloton & al. 3 T. R. 621-'22; Haselinton v. Gill, Id. 620, n. (a); Cadogan v. Kennett, Cowp. 432; Lady Arundell v. Phipps & al. 10 Ves. 139, 150.) But the registry of such a deed, thus wanting in the designation and description of the property, conveys no notice, in point of law, to a subsequent purchaser of the existence of the instrument; nor would he be affected by actual notice of its existence, unless he had also notice of the property embraced in it. (Mundy v. Vawter & als. 3 Grat. 545.)

If the settlement, or agreement for a settlement, be made after marriage, without the intervention of a trustee, between the husband and wife alone, it is valid in equity, so it be not to the prejudice of creditors; and supposing it to be *under seal*, so as not to be *nudum pactum* at law, it will be decreed in equity to be carried into effect, although there be no valuable consideration therefor (for marriage already contracted without reference to a settlement cannot be a consideration), for the existing *relation of husband and wife* constitutes a *meritorious cause* sufficient to call forth the powers and justify the intervention of a court of chancery, being one of the very few cases where a consideration *merely good*, and not valuable, is of any avail whatever. Even had the transaction, instead of an *executory contract*, been

an *executed conveyance*, with no trustee interposed, it is only as an *executory trust* that a court of chancery could give effect to it, and charge the husband as trustee. (2 Stor. Eq. §§ 973, 987; *Coleman v. Sarrel*, 1 Ves. Jr. 54-5; *Ellison v. Ellison*, 6 Ves. 656; 1 Wh. & Tud. L. C. 193, 216 & seq.; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 98-9; *Ellis v. Nimmo*, Lloyd & Goold, (10 E. Ch.) 333; *Shepard v. Shepard*, 7 Johns. Ch. R. 57; *Jones v. Obenchain*, 10 Grat. 262 & seq.) The cases of *Holloway v. Headington*, 8 Sim. (11 Eng. Ch.) 324; *Dillon v. Coppin*, 4 My. & Cr. (18 E. Ch.) 647; *Jefferys v. Jefferys*, 1 Cr. & Phil. Id. 138, which are often cited (1 Wh. & Tud. L. C. 203 & seq.) as holding that equity will not enforce nor give effect to any imperfect gift founded merely on a *meritorious* consideration, though in favor of a wife, are satisfactorily explained as not warranting that doctrine. (1 Wh. & Tud. L. C. 217-18; *Jones v. Obenchain*, 10 Grat. 264.)

Where the settlement is made, however, in contemplation of a separation, a court of equity declines to enforce it as being adverse to public policy, and as, moreover, being without mutuality, the wife having no capacity to contract. But if there be a third person interposed, with whom mutually binding stipulations can be made, the fact that the same deed provides for a separation will not vitiate the property part of the transaction, although so much as relates to the separation will be of no effect. (2 Kent's Com. 176; *Ante*, p. 313 2^d.)

3^h. Effect of Marriage on the Property of Each Consort in Regard to the Other.

Let us advert to, (1), The wife's ante-nuptial conveyances, etc., in fraud of the husband's marital rights; (2), The interest conferred by marriage upon either consort in the property of the other;

W. C.

1st. The Wife's Ante-nuptial Conveyances, etc., in Fraud of the Husband's Marital Rights.

As the law imposes upon the husband the obligation of supporting the wife during coverture, and of being answerable during that period, apart from any statute, for her ante-nuptial contracts and torts, and for her post-nuptial torts, it would seem in some cases, even after determination of the coverture; and as she is, moreover, entitled to dower in his lands if she survives him, besides a liberal proportion of the surplus of his personality after the payment of his debts, so he is, in fairness, entitled to expect that she will not seek to deprive him of that marital interest in her property which the law accords him. Hence, if just previous to the marriage, and in anticipa-

tion of it, she makes a *voluntary* conveyance (that is, a *gift*) of what belongs to her to some one else, without his knowledge or consent, it is deemed a fraud upon his rights, and therefore voidable by him. But a conveyance executed by the woman *prior to the treaty* of marriage (which was very suddenly consummated), although but a little while before the marriage took place, was held to be good, and much more one which, whilst it was executed only a few days anterior to the marriage, yet was designed to *secure a debt* due to a daughter by a former marriage. (Strathmore v. Bowes, 1 Ves. Jr. 23; Waller v. Armistead's Adm'r, 2 Leigh, 14; Fletcher & ux. v. Ashby & als. 6 Grat. 332; Gregory & al. v. Winston's Adm'r, 23 Grat. 102.) Indeed, the equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question whether the facts proved do or do not amount to sufficient evidence of fraud practiced on the husband. And, in general, the existence of a valuable consideration accruing to the woman repels the idea of fraud as respects the husband, even though she particularly desired that the transaction might be concealed from him. (Blanchet v. Foster, 2 Ves. Sen. 264; Crump & als. v. Dudley, 3 Call, 439; Gregory & al. v. Winston's Adm'r, 23 Grat. 122; England v. Downes, 2 Beav. (17 Eng. Ch.) 528; Countess of Strathmore v. Bowes, 1 Ves. Jr. 23; 1 Wh. & Tud. L. C. 311 & seq.)

As to what is *sufficient evidence* of fraud in such cases, the authorities are far from uniform. See 1 Wh. & Tud. L. C. 312 & seq.

- 2ⁱ. Interest Conferred by Marriage upon the Husband and Wife, Respectively, *in the Property of Each Other*; w. c.
 1^k. Husband's Interest *in the Wife's Property*.

We are to advert under this head to, (1), The doctrine touching the husband's interest in the wife's property at common law; and (2), By statute in Virginia;

w. c.

- 1^l. Doctrine Touching the Husband's Interest in the Wife's Property *at Common Law*.

Let us consider under this head, (1), Husband's interest in the *wife's chattels*; and (2), His interest in her *freehold lands*;

w. c.

- 1^m. Husband's Interest in the *Wife's Chattels*.

The wife's chattels, with respect to which the husband's marital rights are to be discussed, consist of, (1), Chattels personal in possession; (2), Chattels real; (3), *Choses in Action*; and (4) *Reversionary property* in chattels, that is, personal property to be *enjoyed at a future time*;

w. c.

1ⁿ. Husband's Interest in the Wife's *Chattels Personal in Possession*; W. C.

1°. The General Doctrine.

All the personal estate in the possession of the wife, *in her own right*, at the time of the marriage, such as money, goods, cattle, household furniture, etc., and even such tangible property (not *choses in action*) as she has not in her *actual possession*, yet if she has a good title thereto, by the marriage becomes, at common law, to all intents and purposes, the absolute property of the husband, which he may dispose of at his pleasure; and if he does not dispose of it, it passes at his death, not to her, but to his personal representative. (2 Bl. Com. 433; Bac. Abr. Bar. & F. (C.) 3; 3 Th. Co. Lit. 309, & n. (O.); 2 Kent's Com. 143; *Faulkner v. Faulkner's Ex'ors*, 3 Leigh, 255; *Pratt v. Taliaferro*, 3 Leigh, 419; *Guerrant v. Hocker*, 7 Leigh, 366; *Taylor v. Yarbrough & ux.* 16 Grat. 183, 190; *White v. White & als.* 13 Grat. 264.) A *negotiable security* (that is, a bill of exchange or negotiable note in such a condition as to *pass by mere delivery*), which belongs to the wife at the date of the marriage, is looked upon, according to what seems to be the better opinion, as a *chattel in possession*, and therefore vests absolutely in the husband; and this appears to be true, although the security be payable to the wife's *order*, and be not endorsed by her. (Bac. Abr. Bar. & F. (K.); *Rawlinson v. Stone*, 3 Wils. 5; *Connor v. Martin*, 1 Stra. 516; *McNeilage v. Holloway*, 1 B. & Ald. (4th E. C. L.) 221.) This absolute transfer of the wife's chattels to the husband by the marriage is not always viewed with a favorable eye, when, after his death, a conflict arises between the surviving wife on one side, and the husband's personal representative on the other. Thus, where a legacy was left to a wife of a chattel already in possession of herself and her husband, by loan from the testator in his life-time, it was held that, in the absence of any proof of the assent of the executor to the legacy (whereby it would have vested in the wife, and become the property of the husband), there ought to be no presumption of such assent merely from the fact that the executor allowed the chattel to remain in the possession of the loanee during a short interval between the death of the testator and that of the husband. (*Livesay v. Helms & als.* 14 Grat. 443; *Wallace v. Taliaferro*, 4 Call, 447; *Gregory's Adm'r v. Mark's Adm'r*, 1 Rand.

355; Taylor & als. v. Yarbrough & ux. 13 Grat. 193.)

It follows, from the foregoing view of the husband's rights in respect to the wife's chattels personal in possession, that if one detain the goods of a *feme covert* which came to his hands before the marriage (and *a fortiori* if they come into his possession after the marriage was contracted), the husband must sue alone to recover them, because the law has vested the *whole property* therein in him. (Bac. Abr. Detinue, (A.); 1 Chit Pl. 84; Draper v. Fulkes, Yelv. 166. But *contra*, 1 Tuck. Com. 329, B. II; Taylor & als. v. Yarbrough & ux. 13 Grat. 191.) Where, however, the suit is brought, *not to recover the property*, but *for the injury* done by the trespass on it, or the conversion thereof, the action ought to be in the name of *both husband and wife*, if the conversion as well as the taking was prior to the marriage; whilst if the taking was before the marriage, and the conversion or other consummation of the wrong afterwards, the husband may, at his election, either sue alone, or may join his wife. (1 Chit. Pl. 84; Wilbraham v. Snow, 2 Saund. 47 i.)

And it should be observed, that wherever the husband *must* sue alone (as to recover the chattel), his marital right is not terminated by the determination of the coverture. (1 Chit. Pl. 83; Bac. Abr. Detinue, (A.); Nelthorp & ux. v. Anderson, 1 Salk. 114; Arundel v. Short & ux. 1 Cro. (Eliz.) 133.)

Where land is directed to be sold, and the proceeds given to a married woman, she takes it as *personalty*, which passes to her husband *jure mariti*; and, being absolutely his, he may take it, and dispose of it, if he is so minded, without actually changing its character as land; nor would it be otherwise if there were reserved to the wife the option to take the property as land, if she never exercised her election, which during coverture she has no power to exercise; but the election must be made by the husband, acting for the wife, or for himself and wife jointly. (Pratt v. Taliaferro, 3 Leigh, 419; Siter & als. v. McClenachan & als. 2 Grat. 280; Haxall's Ex'ors v. Shippen & ux. 10 Leigh, 536; Lewis v. Caperton's Ex'or, 8 Grat. 148; Shanks v. Edmondson, 28 Grat. 812. But see Dandridge v. Minge, 4 Rand. 397; Harcum's Adm'r v. Hudnall, 14 Grat. 369.)

2°. Exceptions to the General Doctrine.

There are some chattels in the possession of the

wife which the law does not cast absolutely upon the husband ;

W. C.

- 1^p. Things Personal which are in Possession of the Wife, in *Auter Droit*, as Executrix, &c.

In these the husband, notwithstanding the marriage, has *no personal interest*. In right of his wife, he does indeed come into possession of them, but only for the purpose of administering the trust upon which she herself had them. (Bac. Abr. Bar. & F. (C.) 3 ; 3 Th. Co. Lit. 309, and n. (O.) ; Id. 311, n. (P.)) And in Virginia, by statute, even this fiduciary possession is done away with, it being provided that where an unmarried woman, who is a personal representative, either alone or jointly with another, shall marry, her husband shall not be a personal representative in her right, but the marriage shall operate as an extinguishment of her authority. (V. C. 1873, ch. 126, § 9 ; V. C. 1887, ch. 119, § 2644.)

- 2^p. Wife's *Paraphernalia*.

The wife's *paraphernalia* is a term borrowed from the Roman law, and derived from the Greek language, signifying something *over and above her dower*. Our law uses it to signify such apparel and ornaments of the wife suitable to her position in society, as are given her *by her husband* (for if given by third persons they are commonly supposed to be designed for her *separate use*, and are absolutely her's, free from his control). *Paraphernalia* are the property of the husband ; and if he chooses to dispose of them in his life-time he is at liberty to do so ; but he cannot deprive his wife of them by his will, nor do they go, at his decease, to his personal representative, except that, so far as may be necessary, to pay his debts after exhausting the rest of his estate, the jewels may be appropriated for that purpose ; but in no case her necessary apparel. (2 Bl. Com. 435 '6 ; 1 Lom. Ex. 455 & seq. ; 1 Bright's H. & Wife, 286.)

- 3^p. Non-Liability, by Statute in Virginia, of Wife's Property to Pay Husband's Debts.

It is enacted in Virginia, by statute of March 31, 1875, that the real and personal property of any female, and the rents and profits thence arising, which she owns at the time of the marriage, or acquires afterwards from any other source than her husband, whether the marriage were solemnized before the act or afterwards, if the property were

acquired after the act, shall not be liable for the ante-nuptial debts of the husband, nor for any contract in renewal of or based upon a consideration arising or existing before the marriage; and although an action or suit may be maintained against the husband and wife jointly for any ante-nuptial debt of the wife, yet the execution on the judgment or decree in such action shall bind only the estate or property of the wife which she shall own at the time of the marriage, or acquire subsequently thereto, and *not that of the husband*. (Acts, 1874-1875, p. 442, ch. 359.)

This statute, it will be perceived, does not deprive the husband of his interest in the wife's property, but only *shields it from his ante-nuptial debts*. It only exempts the husband from liability for the *wife's* ante-nuptial debts, save only to the extent of the property which comes by her. Whether, if he convert that property, so that it no longer exists in kind, he will be liable for its value to the wife's ante-nuptial creditors, the act does not determine.

But the policy which was feebly shadowed forth in the Act of March 31, 1875, was unhappily consummated by Act of April 4, 1877, (Acts 1876-7 p. 333, ch. 329; V. C. 1887, ch. 103, §§ 2284 & seq.) whereby the whole of the property of any woman *thereafter married*, owned by her at the time of the marriage, or acquired afterwards, was declared *to be and continue her separate and sole property*. And it was also declared that any property *thereafter acquired* by any married woman should *be and continue her sole and separate estate*. Of this act more will be said presently. (*Post*, pp. 338 & seq.)

2ⁿ. Husband's Interest in the *Wife's Chattels Real*.

Chattels real are interests which concern or savor of the realty, but do not attain to the dignity of estates of *freehold*, and are appointed by the law, upon the decease of the owner, to pass, along with the great bulk of his movable property, to his personal representative. They consist of *estates* (or *terms*) *for years*; of estates *by elegit*, which are neither more nor less than estates for years; and while the military tenures subsisted, of *wardships in chivalry*, and the like. They are *chattels*, because they pass, like chattels, to the *personal representative* of the owner at his death; and *chattels real*, because they concern or savor of the realty. (2 Bl. Com. 386; 3 Th. Co. Lit. 293.)

Chattels real belonging to the wife in her own right, and not to her *separate use*, are absolutely at the husband's disposal during the coverture. He may sell or charge them as he thinks fit, in whole or in part, but cannot dispose of them *by will*, and to the wife's prejudice; and so much as he does not *absolutely* dispose of during the coverture, at the termination thereof goes to the survivor—that is, to the wife, if she survive, or else to him. If he merely *charges* them, that does not defeat the wife's right of survivorship, if she survive, unless the charge be enforced, and the debt made out of the property, during the coverture. Hence the term may, at common law, be taken in execution for the husband's debt during the coverture and sold, whereby the wife's survivorship will be defeated; but if a judgment is merely obtained, without seizing the term in execution, and the wife survive, she will have it; for her title by survivorship has relation to the marriage, and is therefore paramount. (2 Bl. Com. 434; 3 Th. Co. Lit. 306 and n. (M.), 307-'8; 1 Lom. Ex'ors, 406 & seq.; Bac. Abr. Bar. & F. (C.) 2.)

It curiously illustrates the manner of the husband's holding, that if he sell the term *on condition*, and enter for the condition broken, *during the coverture*, he is re-possessed as before, in his wife's right; but if the condition be not broken until after the *coverture ended*, the personal representative of the husband ought to enter, and the wife's right is barred. (3 Th. Co. Lit. 307.)

If at the time of the marriage the wife has been dispossessed of her term, the husband may either sue alone to recover it, or he may join his wife with him. If he sues alone, his recovery will vest the term absolutely in himself; but if she is joined with him, the recovery will be joint, and he will hold it thenceforward, like any other term belonging to her. (1 Bl. Com. 443, n. (44); 3 Th. Co. Lit. 307; 1 Lom. Ex'ors, 407; Bac. Abr. Bar. & F. (C.) 2.) On the other hand, if the term is not recovered *at all* during the coverture, either by the husband suing alone or by the husband and wife suing jointly, the husband's *marital* rights are at an end; and if he survives, he can recover only as his wife's *administrator*, whilst if she survives, she is entitled to the term by survivorship. (3 Th. Co. Lit. 307-'8; 1 Lom. Ex'ors, 408-'9.)

Chattels real, in modern times, are well nigh universally *in possession*, and *not in action*. At common

law, whilst the feudal tenures remained unimpaired, a right of *wardship*, in case of tenure by knight-service, or a right *valore maritagii* (to the value of the marriage of the ward), under the same tenure, afforded illustrations of chattels real which might be *in action only*. And in those cases the doctrine was that the husband should not have them at all unless he recovered them in the *life time of the wife*, even though he survived her. (3 Th. Co. Lit. 308.) But at present the only remnant of chattels real *in action*, it is believed, exists in the case of what Lord Coke denominates chattels real of a *mixed nature*, partly in possession and partly in action, as when the husband is seised, in right of his wife, *of a rent*, upon which some arrears having accrued, the wife dies; in which case the husband shall have the arrearages, although, if the wife had survived, she should have had them. (3 Th. Co. Lit. 308.)

3ⁿ. Husband's Interest in the Wife's *Choses in Action*.

A *chose in action* is a right arising out of contract, such as a debt, or damages for breach of contract, or for a tort connected with contract, including a legacy or distributive share. (Bouv. Law D., *Chose*.) And in so far as relates to the law of husband and wife, a *chose in action* includes also, not without some inaccuracy, the right to damages for torts to the wife's person or property. It is called a *chose* as being a *thing or property*; and it is said to be *in action*, because it can be enforced only *by action*. Whilst marriage, as we have seen, is an absolute gift to the husband of all the wife's chattels personal in *possession* in her own right (*choses in possession*, as they are sometimes styled), it is only a qualified gift of *choses in action*, which become the property of the husband *jure mariti*, only in case he reduces them into actual or constructive possession during the coverture. Upon such reduction into possession, they are absolutely and entirely his own, and shall go to his executors or administrators, and shall not re-vest in the wife. But if the marriage is determined by the death of either party, or by a divorce *a vinculo matrimonii*, before he has reduced them into possession, his *marital right* ceases; and if his wife survive the coverture, either by out-living him or by reason of a divorce *a vinculo*, she takes the property wholly free from any claims on the part of himself, his personal representative, or his creditors. If he survive her, then, though his claim *as husband* is at an end, yet he has a right to be her administra-

tor, (V. C. 1873, ch. 126, § 4; V. C. 1887, ch. 119, § 2639), and in that capacity may recover such *choses in action*; and having done so, although he must pay therewith all her debts (*ante-nuptial debts* of course), as far as the value extends, yet by the statute of distributions (V. C. 1873, ch. 119, § 10; V. C. 1887, ch. 113, § 2557), he is in general her sole distributee. (2 Bl. Com 434; 3 Th. Co. Lit. 309-10, and n. (O.); May v. Boisseau, 22 Leigh. 512; Browning v. Headley, 2 Rob. 340; Dold's Trustee v. Geiger's Adm'r, 2 Grat. 105; Vance v. McLaughlin's Adm'r, 8 Grat. 289.)

The reduction into possession, as already intimated, may be either actual or constructive; *actual* when the money due by virtue of the *chose in action* is paid to and received by the husband or his agent; or *constructive* when, without such actual receipt, acts are done which *change the property* in the subject. Thus it is reduced *constructively* into possession by *judgment* recovered in an action instituted *by him alone* (and followed by execution levied), when it is admissible for him thus to sue; by *decree in equity*, directing payment *to him*; by an *assignment* for value, when it is capable of being reduced into possession immediately; or by a *release* by him. (3 Th. Co. Lit. 310, n. (O.); 1 Bright's H. & Wife, 53, 61, 69, 72, 86; Bates v. Dandy, 2 Atk. 208; S. C. 3 Russ. (3 Eng. Ch.) 72, n. (b); Honner v. Morton, 3 Russ. (3 Eng. Ch.) 68-9; Heygate v. Annesley, 3 Bro. C. C. 362, & notes; Ld. Carteret v. Paschal, 3 P. Wms. 199; Taliaferro v. Taliaferro, 4 Call, 93; Gregory's Adm'r v. Mark's Adm'r, 1 Rand. 330; Archer v. Colby & ux. 4 H. & M. 410; Vaughan & ux. v. Wilson, Id. 452; Dandridge & Minge, 4 Rand. 397; Browning v. Headley, 2 Rob. 370-72; Yerby & ux. v. Lynch & als. 3 Grat. 475, 495, 507; Hareum's Adm'r v. Hudnall, 14 Grat. 379; Ware v. Ware, 28 Grat. 674 & seq.; Shanks v. Edmondson, 28 Grat. 812 & seq.)

It should be observed, however, that whilst the doctrine above stated is believed to be the prevailing one with us, the later English cases hold that the mere assignment for value by the husband of the wife's *choses in action*, does not of itself amount to a constructive reduction of them into possession, so as to divest the wife's interest in case she should survive; but that such assignee, like the husband himself, must reduce the *choses in action* into actual possession during the coverture, or else the assignment is a nullity against the wife surviving. (1 Bright's

H. & Wife, 86; Edwin v. Williams, 13 Sim. (36 Eng. Ch.), 309; Le Vasseur v. Scratton, 14 Sim. (37 Eng. Ch.) 116.) And this doctrine derives not a little countenance in Virginia from the case of Hayes v. Ewell's Adm'r, 4 Grat. 11, 15.

The husband's possession, in order to avail to bar the surviving wife's claim, must be in the *character of husband*, and not in some other capacity, namely, as executor, trustee, or otherwise. (Baker v. Hall, 12 Ves. 501; Wall v. Tomlinson, 16 Ves. 416; Schuyler v. Hoyle, 5 Johns, C. R. 211; Wallace & ux. v. Taliaferro & ux. 2 Call, 471, 474, 476, 490; Blakey v. Newby's Adm'r's, 6 Munf. 70; Livesay v. Helms, 14 Grat. 441.)

If the *chose in action* be of an *equitable* character (that is, such as can be recovered only in a court of equity), the wife is entitled to a reasonable settlement out of it, not only against her husband, but against all creditors of, and purchasers from him; unless the husband has acquired a title thereto by antenuptial contract with the wife, or has already made a proper settlement on her. This doctrine, which in consequence of its being administered in the court of chancery, is familiarly known as the *WIFE'S EQUITY*, originated in a favorite principle of that court, that "he who asks equity must do it;" but it is now enforced as readily at the instance of the wife herself as plaintiff, as when the husband invokes the aid of the court. (2 Stor. Eq. § 1414; Bosvill v. Brander, 1 P. Wms. 459-'60; Elibank v. Montolieu, 5 Ves. 737; Murray v. Elibank, 10 Ves. 84; S. C. 13 Ves. 1; 1 Wh. & Tud. L. C. 333, 348; Browning v. Headley, 2 Rob. 341, 371; Dold's Trustee v. Geiger's Adm'r. 2 Grat. 98, 104; Poindexter & ux. v. Jeffries & al. 15 Grat. 368; White v. Gouldin, 27 Grat. 504 & seq.)

The doctrine, however, is still applicable to *equitable choses in action* alone; so that, if the husband can recover them *at law*, without the aid of a court of chancery, or has actually obtained possession without an agreement for a settlement, the *equity* in question does not exist. And when, by being reduced into the husband's possession, the subject has once been released from the wife's claim, it is not afterwards made liable thereto, by reason of any supervenient occasion to seek the aid of a court of chancery. (1 Wh. & Tud. L. C. 350-'51; Poindexter & ux. v. Jeffries & als. 15 Grat. 369; Cronie v. Hart & als. 18 Grat. 744.)

The subject of the *wife's equity* is any *property, of*

whatever description, which is recoverable only in a court of chancery; and embraces, therefore, as well real estate as personalty. The criterion is not at all the *nature of the property*, but whether or not it is needful to *apply to chancery* to make the interest of the husband or his assignee available. Hence, where the wife's estates were mortgaged by the husband and wife, and the husband becoming bankrupt, his assignee sought to subject the *equity of redemption*, it was determined that the *wife's equity* should prevail; and when, on the other hand, a father, dying *intestate*, left real and personal property to descend and pass to his married daughter, she was held to have a rightful claim to her equity as to her distributive share of the personalty, which was recoverable in equity, but not as to her portion of the lands, which her husband had the right to enter upon immediately upon her father's death, or if the possession were withheld, to sue for and recover at law. (Sturges v. Champneys, 5 My. & Cr. 97; Murray v. Lord Elibank, (10 Ves. 84), 1 Wh. & Tud. L. C. 334-5; Poindexter & ux. v. Jeffries & als. 15 Grat. 370-71; Dold's Trustee v. Geiger's Adm'r, 2 Grat. 98.)

The *amount to be settled* is in the discretion of the court, which takes into consideration the fortune already received by the husband through the wife, and any previous settlement which may have been made. The true principle is, that the provision thus made shall be *reasonable and adequate* upon all the circumstances of the case. Hence, whilst in some cases one-half and three-fourths of the fund in question have been allowed, in others, *the whole* has been settled. The usual practice is to refer it to a commissioner, to enquire and report what would be an adequate and reasonable provision. But the court may decide this question for itself, if there be sufficient material in the record for the purpose; and if it plainly appear that the whole property is not more than adequate, a reference to a commissioner is of course not necessary. (Browning v. Headley, 2 Rob. 340; Poindexter & ux. v. Jeffries, 15 Grat. 372; 1 Wh. & Tud. L. C. 353, 354; Penn's Adm'r v. Spencer & al. 17 Grat. 85; White v. Gouldin, 27 Grat. 504 & seq.)

The *time* when the provision in the wife's favor shall take effect is also referred to the discretion of the court, to be determined upon the circumstances of the case. If the husband lives with and supports her, it may be made to take actual effect when he

ceases to do so, or at his death, the husband meanwhile enjoying the income, and the principal of the fund being secured for the wife's benefit. But if he has deserted or ill-treated her, or is unable or fails to support her, it will be directed to commence immediately. (*Poindexter & ux. v. Jeffries & als.* 15 Grat. 373; *Murray v. Ld. Elibank*, 1 Wh. & Tud. L. Cas. 353.)

This *equity of the wife* is so substantial an interest that it will constitute a valuable consideration for a post-nuptial settlement by the husband upon her (made while the equity subsists), which will be sustained against his creditors, to the extent of the value of the equity. (*Murray v. Elibank*, 1 Wh. & Tud. L. C. 354; *Poindexter & ux. v. Jeffries & als.* 15 Grat. 373; *White v. Gouldin*, 27 Grat. 504 & seq.)

The wife's equity extends to a provision for her child, as well as for herself; and yet it is so strictly personal to her, that she may waive it at any time before the settlement for the joint benefit of her children and herself is actually completed, and may thus defeat the interest of the children. And so, also, if she dies before a decree or an agreement for a settlement is made, the children take nothing. But while they have no right to a settlement independently of *contract or decree*, yet if there be either of these, and the wife die, the children do not thereby lose their interest; nor can the wife, after a contract or decree contemplating and providing for the children, waive the settlement so as to compromise their rights. (2 Stor. Eq. §§ 1417 & seq.; *Murray v. Ld. Elibank* (13 Ves. 1), 1 Wh. & Tud. L. C. 329, 340 & seq. 352-'3; *Scriven v. Tapley*, 2 Eden. 327; *Hodgens v. Hodgens*, 11 Bligh. N. S. 104; *Lloyd v. Williams*, 1 Madd. 467; *Lloyd v. Mason*, 5 Hare (26 Eng. Ch.) 149; *Fenner v. Taylor*, 2 Rus. & My. (13 Eng. Ch.) 190.)

The wife's waiver of her rights must be accompanied with all the solemnities by which the law seeks to protect married women from undue influence and constraint, namely, by a privy examination, separate and apart from her husband, in court, or in pursuance of a commission issued from the court, or perhaps in the manner prescribed by statute for the execution of *conveyances* by married women. (1 Dan. Chan. Pr. 115-'16; 2 Stor. Eq. § 1418; *Bac. Abr. Bar. & F. (M.)*; *Spurling v. Rochfort*, 8 Ves. 175, n. (a); 1 Wh. & Tud. L. C. 345; *V. C.* 1873, ch. 117, §§ 4, 7; *V. C.* 1887, ch. 111, § 2502, which un-

happily dispenses with any explanation or privy examination.)

But the wife's equity may be defeated or barred, not only by the *waiver* thereof in due form, but also by the husband or his assignee getting actual possession of the subject before any bill in behalf of the wife is filed; by an *adequate* post-nuptial settlement; or by *any settlement before marriage*, containing a stipulation against her claim: and to a limited extent by the *wife's misconduct*, as by her adultery or desertion. But whilst in this last case she cannot insist on a settlement, having thus lost sight of her conjugal duty, yet it seems that the husband even then will not be allowed in equity to receive the *whole of her equitable property* while he *does not maintain her*; nor, on the other hand, will any portion be assigned to her, at least while she continues in adultery; for, as has been observed by a great judge, "it would be enormous to give it to enable her to keep her gallant"; but if she ceases to live with the adulterer, it may be supposed that equity would not decline to decree her, out of her own estate, something for maintenance, in order to prevent her from relapsing into evil courses. At all events, the fund will be ordered to be *paid into court*, to await such future disposition as circumstances shall indicate. (Murray v. Ld. Elibank (10 Ves. 84), 1 Wh. & Tud. L. C. 347; Salwey v. Salwey, 2 Ambl. 692; Garforth v. Bradley, 2 Ves. Sr. 675; Carr v. Esterbrooke, 4 Ves. 186; Ball v. Montgomery, 2 Ves. Jr. 197, 199.)

The "*wife's equity*" will soon be a thing of the past in Virginia, under the influence of the "Married Woman's Law," which will be presently set forth at length. It will suffice just here to say, that it enacts in substance, that all real and personal estate to which any woman hereafter marrying is entitled at the time of her marriage, or which any married woman may hereafter acquire, or become entitled to during coverture, in any manner whatever, shall be and continue her *separate estate*, not subject to the use, control or disposal of her husband, or to his debts or liabilities, whether contracted or incurred before or after marriage. (V. C. 1887, ch. 103, §§ 2284, 2285.)

4ⁿ. Husband's Interest in *Wife's Reversionary Property in Chattels*.

The term *reversionary* is employed, not very happily, to denote interests which are to be enjoyed at a

future time, and not *in presenti*; with or without an intervening estate in some one else. Thus, a gift of State bonds to B, to take effect at the age of twenty-one, or to A until B attains the age of twenty-one, and then to B, is in either case a *reversionary interest*. To such reversionary interests in chattels belonging to the wife, supposing them to continue reversionary, if she survive the *coverture* (whether the same be terminated by the husband's death or by a divorce *a vinculo*), she is entitled, by survivorship, not only as against the representatives and general assignees of the husband, but also as against his particular assignee for valuable consideration. But if the coverture outlasts the period during which the interest is reversionary, or if (the coverture being determined by the *death of the wife*) the husband survive such period, so that he is in a condition to reduce the *chose* into possession, the interest belongs to him, or to his assignee; and as between him and such assignee, it will belong to the assignee not only where the assignment is for value, but also where it is purely *voluntary*. (1 Bright's H. & Wife, 83, &c.; Hornsby v. Lee, 2 Mad. R. 16; Purdew v. Jackson, 1 Russ. (1* E. Ch.) 1; Honner v. Morton, 3 Russ. (3 E. Ch.) 65; Dade v. Alexander, 1 Wash. 30; Drummond v. Sneed, 2 Call, 491; Wade v. Boxley, 5 Leigh, 442; Browning v. Headley, 2 Rob. 370; Hayes v. Ewell's Adm'r & als. 4 Grat. 11; Moore v. Thornton & als. 7 Grat. 99; Taylor & als. v. Yarbrough & ux. 13 Grat. 192; Henry v. Graves, 16 Grat. 248, 254-'5; Moorman v. Smoot, 28 Grat. 85.)

It would seem, however, that if the wife dies before the event happens upon which the reversionary interest comes into possession, the surviving husband or his assignee can take it only as the wife's *personal representative*, and subject to the obligation to pay out of it her ante-nuptial debts (1 Bright's H & Wife, 41); although there is not wanting very imposing authority tending to show that in such case the husband takes *jure mariti*, and not merely as his wife's administrator. (Wade v. Boxley, 5 Leigh, 442; Henry v. Graves, 16 Grat. 255; Harvey v. Skipwith & als. 16 Grat. 409.)

2^m. Husband's Interest in *Wife's Freehold Lands*.

We have seen what interest the husband takes in the wife's *chattels real*, or terms for years (*Ante*, p. 328, &c.), and it now remains to inquire into his interest in those lands wherein she has an estate of *freehold*, that is, of *indeterminate duration*, as in

fee-simple, for life, or for any other indeterminate period.

He does not by the marriage become absolute proprietor of this species of the wife's property, nor is he entitled to dispose of it at his pleasure; but as the head and governor of the family, the management of it, and the rents and profits thereof, devolve upon him during the coverture, the freehold remaining entire after the husband's death to the wife, or her heirs; unless by the birth of a living child where she is seised of an estate of inheritance, he becomes entitled to an estate *for his life*, by the *curtesy*. The husband and wife are said, therefore, to be seised of the wife's freehold lands *in right of the wife*, in fee or otherwise as the case may be; and whilst his alienation or his charges by mortgage, etc., are good as against himself,—that is, during the coverture, or if he be tenant *by the curtesy*, during his life,—yet they will avail nothing after his interest is terminated, unless she unites with him in the conveyance in the manner prescribed by law. (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502.) At common law, indeed, he had power to transfer the whole estate of his wife, that is, *to discontinue it*, subject only to be avoided by the subsequent action of the wife, or her heirs. This doctrine, however, is obviated by statute (after the model of 23 Hen. VIII., c. 21), which declares (V. C. 1873, ch. 129, § 2; V. C. 1887, ch. 122, § 2713), that “no conveyance or other act suffered or done *by the husband only*, of any land which is the inheritance of his wife, shall be or make any discontinuance thereof, or be prejudicial to the wife or her heirs, or to any having right or title to the same by her death, but they may respectively enter into such land, according to their right and title therein, as if no such act had been done.” (3 Th. Co. Lit. 305, n. (L.); Id. 113, n. (R.); Id. 116, and n. (U.); Bac. Abr. Bar. & F. (C.) 1; 1 Bright's H. & Wife, 112 & seq.; Polyblank v. Hawkins, 1 Dougl. 329; Dejarnette v. Allen & ux. 5 Grat. 512-'13.)

It is further to be observed, that if the husband, or the husband and wife, agree to sell and convey the wife's lands, the agreement cannot be *specifically enforced* against either of them; not against the wife, because she is incapable of binding herself by any *executory contract*; nor against the husband, because coercion employed against him would amount to the moral coercion of the wife. The only remedy upon such an agreement is an action thereon *against the*

husband, to recover damages for its breach. (1 Bright's H. & Wife, 187 & seq.; 2 Stor. Eq. §§ 731 & seq.; Emery v. Wase, 8 Ves. 514; Clark v. Reins, 12 Grat. 106 & seq.)

And since the agreement cannot be specifically enforced *against* husband and wife, it follows that, for want of mutuality, it cannot be enforced *by them*. (Watts & al. v. Kinney & ux. 3 Leigh, 272, 290; Chilhowie Iron Co. v. Gardiner, 79 Va. 311.)

The husband's estate *by the curtesy* is defined to be "where a man *takes a wife seised during the coverture* of an estate of *inheritance*, legal or equitable, such as that the *issue of the marriage* may by possibility *inherit* it as *heir to the wife*, has issue by her *born alive* during the coverture, and the *wife dies*, the husband surviving has an estate in the land *for his life*, which is called an *estate by the curtesy*." Its nature and incidents will be more particularly set forth in another place. (2 Bl. Com. 126; 2 Min. Insts. 102 & seq.)

The *Married Woman's Law*, as contained in the Revisal of 1887, is in its principal provisions the same as that originally enacted April 4, 1877, and contained in Acts 1876-7, p. 247, ch. 265, but it is more minute and precise, and obviates most of the objections which lay against the mere frame-work of the original act. It is to be found in V. C. 1887, ch. 103, §§ 2284 to 2298.

The substance of the statute is as follows :

(1.) § 2284. The *whole estate* of any woman belonging to her at the time of her marriage, or acquired afterwards in any manner, is, and continues, her separate estate.

This separate estate includes all property belonging to her, real and personal, in possession or in action.

(2.) § 2285. This separate property of the wife shall not be subject to the use, control or disposal of her husband, or to his debts or liabilities, whether antenuptial or post-nuptial.

(3.) § 2286. The wife may hold, control, and use her separate estate as *if she were sole*, and by her *sole act*, may encumber, convey, devise, bequeath or otherwise dispose of it, in the same manner, and with the like effect as *if she were unmarried*. *Provided* that her husband shall be entitled to curtesy in her separate real estate, where the requisites therefor exist, and he shall not be deprived thereof by her sole act; but not so as to entitle him to the possession or profits *during the coverture*.

(4.) § 2287. The wife may carry on business (*but not as partner* with her husband), for her separate use and benefit, as if she were unmarried. And all work performed by her, except for her husband or children, shall be presumed, if there be no express agreement to the contrary, to be on her separate account; and the products and earnings shall be her separate estate.

(5.) § 2288. She may make contracts, as if sole, in respect to such separate business or labor, and upon such contracts, and as to all matters connected with, relating to, or affecting such business or labor, she may sue and be sued, with like remedies *for and against her and her separate estate*, as if she were unmarried.

(6.) § 2289. In such cases, a *personal judgment or decree* may be rendered for or against her; and when against her, may be enforced *against her*, and her separate estate (*but only against such estate*), as if she were unmarried.

(7.) § 2290. No contract or liability of a wife in respect to her separate estate, business or labor, or with reference to her said estate as a source of credit, shall render her husband responsible therefor; nor shall he be responsible for the *ante-nuptial debts or liabilities* of the wife, if the marriage occurred after March 31, 1875.

(8.) § 2291. A married woman who is a minor does not have the control of her separate estate (except the products of her personal labor); but the circuit or corporation court of the county or corporation where she resides, or where the said estate or any part of it is, or the judge of such court in vacation, shall on the petition of her next friend, commit her estate to a *receiver*, who shall give bond before the court or judge, and shall hold and manage the said estate, and pay out the profits and income thereof to her separate use, under the direction of the court, or apply the estate, or any part thereof, if the court so order, to her separate use during coverture, and while she is a minor; and upon her attaining the age of twenty-one, all such estate, and the profits and income thereof, not before paid out or applied as aforesaid, shall be delivered to her, or if she die before attaining that age, to those entitled thereto.

The seisin requisite for the husband's curtesy in the wife's real estate committed to the receiver, shall be presumed for the purpose of curtesy, if there would have been such seisin had it not been so committed.

(9.) § 2292. Any estate to which a married woman who is a minor on the day this Code takes effect (1

May 1888), is entitled as her separate estate, under the Act of 4th April 1877, or its supplement of 14th March 1878, shall also be committed to a *receiver*, as under the preceding section. And if such estate be in the hands of a *guardian*, he shall pay and deliver it to the receiver.

(10.) § 2293. Any estate which by this chapter, or by the acts referred to in the preceding section, is her separate estate, shall, if she dies intestate as to such estate or any part of it, pass according to the statute of descents and distributions (V. C. 1887, ch. 113), subject to her debts, and her husband's curtesy, if he survive her.

(11.) § 2294. Nothing in this chapter shall be construed to prevent the creation of *equitable separate estates*; which shall not be deemed to be within the operation of the foregoing sections, but they shall be held according to the provisions of the respective settlements, and shall be governed by the rules and principles of equity applicable to such estates.

(12.) § 2295. Every contract *hereafter* made by a married woman, which she has the power to make, shall be deemed to be made with reference to her separate estate arising *under this chapter*, as a source of credit; and also with reference to her *equitable separate estate*, if any she has, to the extent of her power over the same, unless the contrary intention is expressed in the contract; *Provided*, that if the contract be a covenant of warranty in a conveyance of lands, mentioned in section 2502, it shall be subject to the provisions of the said section.

(13.) § 2296. If a husband wilfully deserts his wife, and the desertion continues until her death, he shall be barred of all interest in her separate or other estate, as tenant by the curtesy, distributee, or otherwise.

(14.) § 2297. All rights accruing before 1st May, 1888, in virtue of the acts mentioned in § 2292, or of the act of 31st March, 1875, exempting the property of each consort from the debts of the other, and all powers and immunities granted, and restrictions and limitations imposed by the same, shall remain unimpaired as respects the separate estate of a married woman which has arisen under either of the said acts before this Code takes effect; except that the husband *need not join* in any contract *hereafter* made by his wife concerning any *personal* separate estate accruing to her under either of the said acts; *nor be joined*, unless interest requires it, in any suit by or against her, upon any contract or liability with reference to such separate estate.

(15.) § 2298. The remedy provided for a married woman by Section 3 of Act of 4th April, 1877, is reserved to her, as to any estate arising under either of the acts aforesaid.

In other respects, the remedies for and against a married woman and her separate estate under the said acts shall be the same as those for or against her as to her separate estate under this chapter.

In describing, *in pleading*, an estate in fee simple in lands which belongs to the wife, it must be averred that the *husband and wife, in right of the wife, are seised in fee simple*, and not *in freehold* merely; and yet the husband is regarded as tenant of the *freehold only*, and therefore has *no right* to commit waste in the lands, though the coverture suspends *any remedy* at common law in her favor against him. Hence, a judgment-creditor of the husband, who extends the wife's lands upon an execution of *elegit*, whilst he succeeds to the husband's legal right to the rents and profits, does not enjoy his immunity from liability for waste. In like manner a lessee or alienee of the husband is liable for waste, and in both cases the action is to be brought in the *name of husband and wife*, she being disabled to sue in her own name. (Bac. Abr. Bar. & F. (C.) 1; Dejarnette v. Allen & ux., 5 Grat. 514-'15.)

- 2¹. Doctrine Touching the Husband's Interest in the Wife's Property *by Statute in Virginia*.

This legislation appears to the writer to be full of evil omen to the domestic peace and social order of the commonwealth, and to the integrity of its people. The objections to the *particular provisions* of this act are much fewer and less important than those which lay to the act of April 4, 1877, and they are thrown quite into the shade by the threatening aspects of the *policy* upon which this, as well as the preceding acts, are founded. That policy proposes—

(1), To subvert the long-tried, and, in the main, well-settled doctrines of the common law touching the relation of husband and wife, and to substitute therefor new principles and provisions, the true import and effect of which it will require much time and expense to adjust and determine;

(2), It tends to abolish virtually the husband's headship of the family, contrary to the common law, to common reason, to the Scriptures, and to the fruitful experience for many centuries of the race from which we spring;

(3), It tends to introduce causes of domestic strife and

dissension, by creating diverse and sometimes conflict-interests in husband and wife ; it incurs the danger of family factions and feuds, and must oft-times lead to that deplorable result, *a house divided against itself* ;

(4), It makes more practicable, and therefore tends to encourage, frauds against creditors, by collusive and pretended transfers of property from one of the parties to the other ; and

(5), It threatens a disastrous increase of litigation, not only as between husband and wife on the one side, and strangers on the other, but also as between the consorts themselves. (3 Min. Insts. 74.)

Of course objections, to the *particular provisions* of the act, may be obviated by suitable modifications of its terms, but no modifications can do away with the grave objections to the *policy* of such legislation.

2^k. Wife's Interest in *Husband's Property*; w. c.

1^l. Wife's Interest in *Husband's Chattels*.

Independently of special agreement by marriage settlement, the wife acquires, in general, by the marriage no other or further interest in the husband's chattels than as his most favored *distributee*, after his death ; although, if she appropriate them to her own use, he can have no remedy against her. (McCormick's Adm'r v. McCormick, 7 Leigh, 66.) As his distributee, prior to the Married Woman's Law, she was entitled, if the husband left *issue by her*, to one-third of the surplus remaining after the payment of his debts ; and if he left *no issue by her*, to such of the surplus as was acquired in virtue of the marriage with her, and shall remain *in kind* at the husband's death (subject to charges of administration and debts so far only as the other personal estate of the husband may be not sufficient to satisfy the same) ; and also, if the husband leave issue by a former marriage, to *one-third*, and if no such issue, to *one-half* of the residue of such surplus. At present, as his distributee, she is believed to be entitled, if the husband leave issue, to one-third of the surplus of personalty remaining after the payment of his debts ; and if he leave no issue, to one-half, it being impossible, as to marriages contracted or property acquired after April 4, 1877, that the husband can *have anything* obtained by virtue of the marriage. But of this distributive share she cannot be deprived by the *husband's will*, nor by any *revocable disposition* which he can make of his chattels, for that would be really testamentary. But he may defeat her claim by an *irrevocable alienation* of his chattels in his life-time, notwithstanding he may reserve a life-estate therein to

himself, or may have had it in view thereby to deprive her of her distributive share. (V. C. 1873, ch. 119 § 10; V. C. 1887, ch. 113, § 2557; Lightfoot's Ex'or v. Colgin & als. 5 Munf. 42, 555; Gentry & als. v. Bailey, 6 Grat. 604.)

In order to prevent any *testamentary* privation by the husband of the wife's rights as his distributee, she is armed with the power of renouncing the provision made for her by his will within one year from its admission to probate, so that such renunciation be made in person before the court of probate, or by a writing recorded in such court, or in the clerk's office thereof, upon such acknowledgment as would authorize a conveyance of lands to be recorded. In the event of such renunciation, or if *no provision at all* be made for her by the will, she shall have such share of her husband's personal estate as she would have had if he had *died intestate*; otherwise she shall have no more thereof than is given her by the will. (V. C. 1873, ch. 119, §§ 12, 14; V. C. 1887, ch. 113, §§ 2559, 2561; Nelson v. Kownslor, 79 Va. 468.) But these provisions in favor of the wife, as distributee of her husband, are all made expressly subject to this qualification,—that if she of her own free will leave her husband, and live in adultery, she shall have no part of the personal estate as to which he dies intestate, unless her husband, after she so left him, be reconciled to her and suffer her to live with him. (V. C. 1873, ch. 119, § 13; V. C. 1887, ch. 113, § 2560; Thornton v. Winston, 4 Leigh, 152; Dupree, Adm'r. v. Cary & al. 6 Leigh, 37; Kinnaird v. William's Adm'r., &c. 8 Leigh, 400; Findlay's Ex'or v. Findlay, 11 Grat. 434.)

To this general doctrine, that the wife has no interest in the husband's chattels, save as his distributee, a qualification must be noted in respect to her *paraphernalia*, the nature of which has been already explained, (*Ante*, p. 327.) See also Bright's H. & Wife, 286; Tipping v. Tipping, 1 P. Wms. 730; Northey v. Northey, 2 Atk. 78-9; Graham v. Londonderry, 3 Atk. 393.

The husband may, of course, bestow articles of apparel and of ornament on the wife, not as her *paraphernalia*, but as her *separate estate*. This, however, is not presumed, since she might then dispose of them absolutely, which would frustrate his purpose of adorning her person for his own honor and that of the family. But such gifts from other persons, as from her relatives or his, or from strangers, are always taken to be for her separate use, unless the contrary be declared. Wherever they have become her separate property, they are

subject to her absolute control, and cannot be interfered with by the husband or his representatives, nor by the husband's creditors, except where they were derived by his gift, made in fraud of his creditors. (1 Lom. Ex'ors, 456; 1 Bright's H. & Wife, 289; Graham v. Londonderry, 3 Atk. 393; McChesney v. Brown, 25 Grat. 393; Burnett & ux. v. Hawpe, Id. 481.)

It is scarcely necessary to say that the wife, by agreement before marriage, may bar her right to *paraphernalia*, or to a distributive share of her husband's estate, as, indeed, either party may, in like manner, by antenuptial contract, relinquish any right to personal or to any other property depending on the marriage. (1 Lom. Ex. 457; 1 Bright's H. & Wife, 294; Cholmley v. Cholmley, 2 Vern. 83; Read v. Snell, 2 Atk. 642; Bray v. Dudgeon, 6 Munf. 132; Charles v. Charles, 8 Grat. 486; Findlay v. Findlay, 11 Grat. 434.)

2¹. Wife's Interest in *Husband's Lands*.

The wife upon marriage acquires an important interest in her husband's lands of inheritance, of which nothing that he can do will thenceforth divest her without her consent. This interest, which is called her *dower*, is closely analogous to the husband's *curtesy*, and will be fully expounded in another place (2 Min. Inst. 117 & seq.). At present it must suffice to state its definition, which recites its prominent incidents: "*Dower is where a woman marries a man seized at any time during the coverture of, or entitled to a right of entry or action in, an estate of inheritance, such as that the issue of the marriage may, by possibility inherit it as heir to the husband, and the husband dies, the wife surviving is entitled to one-third for her life, as tenant in dower.*" (2 Min. Inst. 117 & seq.; 1 Th. Co. Lit. 569, 578; V. C. 1873, ch. 106, §§ 1, 2; V. C. 1887, ch. 102, §§ 2267, 2268.)

The claim to dower is paramount to the husband's *post-nuptial* debts in all cases where the wife has not relinquished her right in due form of law; and is paramount also to his *ante-nuptial* debts, unless before marriage they were charged *specifically* by judgment, deed of trust, or otherwise, upon the land. Nor can the husband defeat the wife's dower by any alienation, or otherwise, after marriage, without her consent, manifested by her executing the conveyance with all the ceremonies (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502), which the caution of the law has devised in the case of married women. (2 Min. Insts. 155, 150-'51; 1 Th. Co. Lit. 568, n. (B.); 1 Lom. Dig. 128-'9, 107.)

Dower may be *prevented* from accruing, or having accrued, may be *barred* by several devices, which are pretty fully set forth in 2 Min. Insts. 142 & seq. That which is incomparably the most usual and familiar is the wife's *uniting with the husband* in the conveyance in the manner prescribed by law (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502), and fully detailed *Post*, pp. 369-70, and also 2 Min. Insts. 150 & seq. and 581.) Another method of *preventing* dower is by *jointure*, which means with us *any estate, real or personal, intended* to be in lieu of dower, *conveyed or devised* for the jointure of the wife, and assented to by her, either before marriage, supposing her to be competent to assent, or after the coverture is determined. (V. C. 1873, ch. 106, §§ 4, 5, 6; V. C. 1887, ch. 102, §§ 2270 to 2272; 2 Min. Insts. 152 & seq.)

3^k. *Wife's Separate Property.*

It is possible, independently of any statute, and in point of fact not unfrequent, for a wife to be possessed of property, real and personal, which shall not be subject to her husband's control, nor to his debts; but which in use and enjoyment, and in power of disposal, shall belong to her exclusively, to all, or at least to most, intents and purposes, as if she were a *feme sole*. Property so situated is denominated the *wife's separate estate*. It may arise out of ante-nuptial dispositions made by the wife herself, or by the husband, or some third person, either before or after marriage. Foreign as such an arrangement is to the settled convictions and policy of the common law, it could not have found a place in our jurisprudence but for the interposition of the court of equity, whose extraordinary jurisdiction in this particular originated through the *doctrine of trusts* in the latter part of the reign of Edward III. (say about A. D. 1370, 2 Min. Insts. 176 & seq.), and has ever since been maturing, in the main wisely, so as to meet the needs of society, but occasionally with a contemptuous indifference to the common law ideas of the relation of husband and wife, which is suggested by the analogies of the Roman law, and tends neither to domestic peace nor to the true happiness of married life.

Every kind of property, including estates in fee simple, and chattels personal and real, may be subject to a trust for the wife's *separate use*, which will be supported in equity; a trust which is effectual against the husband, although the wife be unmarried at the time of its creation, or being then married, have become *discoverd*, and afterwards married again. It may, to be sure, be confined in its operation to a particular coverture, but it

may also be limited free from the interference or control of *any future husband*; and whether it be one or the other will depend on the terms of the instrument creating the trust. (2 Bright's H. & Wife, 204-'5; 2 Stor. Eq. §§ 1378 & seq.; 1 Bish. Marr. Women, §§ 814 & seq.; Haymond v. Jones, 33 Grat. 320.)

In respect to the *phraseology* which suffices to create a separate estate in the wife, it is to be observed that, whilst no particular form of words is necessary, yet the husband's *legal rights* to the wife's property, by virtue of the marriage, and its obligations, are neither to be cancelled nor abridged, save in pursuance of an intention to that effect *plainly manifested*. The mere fact of vesting property *in trustees*, in trust for the benefit of the wife, on the part of a *stranger*, does not create in her favor a separate estate therein. (2 Bright's H. & Wife, 206; 2 Stor. Eq. §§ 1381 & seq.; 1 Bish. Marr. Wom. §§ 828, &c. § 839, n. (2); Brown v. Clark, 3 Ves. 166; Lambe v. Milnes, 5 Ves. 521; Rich v. Cockell, 9 Ves. 377; Prout v. Roby, 15 Wal. 474; Pickett v. Chilton, 5 Munf. 481; West v. West, 3 Rand. 373; Lewis v. Adams, 6 Leigh, 320, 331, 335; Mitchell v. Moore & als. 16 Grat. 280; White v. White, 16 Grat. 264; Buck & als. v. Wroten & ux. 24 Grat. 253; Haymond v. Jones, 33 Grat. 321 & seq.)

Hence a legacy to a married woman for her "*own use and benefit*;" to her "*own proper use and benefit*;" "to be *under her sole control*;" "to be paid into her *own proper hands*, to and for her *own use and benefit*;" to a woman and her assigns, "for her and their *absolute use and benefit*;" is not by any of these expressions constituted the *wife's separate property*. (2 Bright's H. & Wife, 206 & seq.; 2 Stor. Eq. § 1383; Hulme v. Tenant, (1 Bro. C. C. 16), 1 Wh. & Tud. L. C. 376-'7; Taylor & als. v. Yarbrough & ux. 13 Grat. 183; White v. White & als. 16 Grat. 268.)

On the other hand, where the gift is "to her *sole and separate use*;" "to her *sole use, benefit and disposition*;" "for her own use and *at her own disposal*;" "for her own *sole use*;" "for her *sole use and benefit*;" "*free from the power* of her husband;" "for her own use and benefit, *independent of any other person*;" "to enjoy and receive the issues, and receive the issues and profits;" "*for her livelihood*;" "*the wife's receipt to be a sufficient discharge to trustee*;" "*the annual produce to be paid into her proper hands*;" "the securities to be delivered up to her *whenever she shall require*;" "for her *support and maintenance*;" "the profits to be paid to her *separate use*;" "to be used by the trustee for

her;"—these expressions have been interpreted to create a *separate estate in the wife*; for which, it will be observed, no precise terms of art are needful, but only a clear manifestation, from the language taken in conjunction with the surrounding circumstances, of an intent to exclude the power and marital rights of the husband. (2 Bright's H. & Wife, 210 & seq.; 2 Stor. Eq. § 1382; Hulme v. Tenant (1 Bro. C. C. 16), 1 Wh. & Tud. L. C. 376-7; Tyrrell v. Hope, 2 Atk. 558; Darley v. Darley, 3 Atk. 399; Stanton v. Hall, 2 Rus. & My. 180; Scott & ux. v. Gibbon, 5 Munf. 90; Smith v. Smith's Adm'rs, 6 Munf. 581; West v. West's Ex. 3 Rand. 373, 377; Lewis v. Adams, 6 Leigh, 320, 335; Cleland v. Watson, 10 Grat. 159; Nixon v. Rose, 12 Grat. 428; Taylor & als. v. Yarbrough & ux. 13 Grat. 183; Haymond v. Jones, 33 Grat. 321 & seq.)

The husband's marital rights, however, let it be repeated, will never be divested to a greater extent than the terms of the settlement clearly require; so that when by the settlement she is allowed to dispose of certain property *by deed or will*, but dies without making any disposition of it, there is no separate estate created, and the husband surviving is entitled, as her distributee, to the personalty. (Moloney v. Kennedy, 10 Sim. (16 Eng. Ch.) 254; Mitchell v. Moore, 16 Grat. 275.)

The foregoing principles are applicable where the property is conveyed to the wife by a *stranger*; but when it proceeds, not from a stranger, but from *the husband himself*, the settled doctrine is that, as a general rule, it is to be construed as operating to her *separate use*, although no such words are used as would be necessary to a separate estate, in a conveyance by a stranger; unless, indeed, the conveyance itself manifests a contrary intent. If it were not so, a conveyance from the husband to the wife would, for the most part, be without effect. (Whitten v. Whitten, 3 Cush. (Mass.) 191; Sayers v. Wall, 26 Grat. 373, 374; Leake v. Benson, 29 Grat. 156; Harshberger v. Alger, 31 Grat. 61; Garland v. Pamplin, 32 Grat. 314.)

There is also a distinction between the case of a gift or bequest to a *married woman*, on the one side, and on the other to an *unmarried woman*, not in contemplation of an immediate marriage, nor as a provision for that event. Thus, the words, "to be at her own disposal," "for her sole and separate use," occurring in a gift or bequest to an *unmarried woman*, may not always create a separate estate, to be enjoyed by her independently of any future husband; whilst, as we have seen, such expressions in respect to a married woman, or in contem-

plation of marriage, would certainly have that effect. The doctrine upon this point, however, is not precisely settled. (2 Stor. Eq. § 1384, and n. 1; Buck & als. v. Wroten & ux. 24 Grat. 253.)

The interposition of trustees, which at first was supposed to be necessary in order to protect the wife's separate estate, has not been deemed indispensable since about 1725. It being a fundamental maxim of equity never to suffer a trust to fail for want of a trustee, where it is plain that a separate estate in favor of the wife is intended to be created, either by an actual conveyance, or by a distinct and irrevocable agreement to convey, a court of chancery will effectuate the design by designating a trustee, either the husband himself or some other person, as circumstances may indicate. Hence, when property is given to a married woman *as her separate estate*, without naming the trustees, and *a fortiori* when it is given *to the husband for her separate use*, the husband will be in equity regarded as her trustee, and at the discretion of the court he may be superseded, and another person appointed trustee. Nay, further, if the husband *before marriage* agrees in writing that his wife shall be entitled to specific parts of his or her estate to her separate use, but in consequence of no settlement having been actually made, the legal title remains, or becomes vested in him by the subsequent marriage, a similar doctrine is applicable, and the husband will be held, in equity, to be a trustee to her separate use. (2 Bright's H. & Wife, 214 & seq.; Slanning v. Style, 3 P. Wms. 334; Lucas v. Lucas, 1 Atk. 270; Bennett v. Davis, 2 P. Wms. 316; Lee v. Prideaux, 3 Bro. C. C. 381; McLean v. Longlands, 5 Ves. 79; Parker v. Brooke, 9 Ves. 583; Rich v. Cockell, 9 Ves. 369; Lady Arundell v. Phipps, 10 Ves. 149; Davidson v. Atkinson, 5 T. R. 434; Wallingsford v. Allen, 10 Pet. 594; Sheppard v. Sheppard, 7 Johns. Ch. (N. Y.) 57, 63; Jones v. Obenchain, 10 Grat. 262, 267; Sayers v. Wall, 26 Grat. 354, 373.)

And although, in consequence of husband and wife being deemed in law *one person*, neither can *at law* make a conveyance directly to the other (1 Th. Co. Lit. 130 & seq.); yet in equity conveyances directly from husband to wife, without the intervention of trustees, have long been sustained where clearly proved, so only that his creditors are not prejudiced, and in general, also, that the husband shall not divest himself of the whole, or of an unreasonable proportion of his estate, which would place him in an attitude of unnatural and unbecoming subordination to his wife, adverse to domestic felicity,

and to public policy. But under circumstances showing the existence of a strongly meritorious consideration, a conveyance even *of the whole* of the husband's property to his wife has been sanctioned. (2 Stor. Eq. § 1374; Lucas v. Lucas, 1 Atk. 270; Beard v. Beard, 3 Atk. 72; Slanning v. Style, 3 P. Wms. 334, 338; Walter v. Hodge, 2 Swanst. 92, 107; Sheppard v. Sheppard, 7 Johns. Ch. (N. Y.) 63; Jones & ux. v. Obenchain & als., 10 Grat. 259; Sayers v. Wall, 26 Grat. 373; *Ante* pp. 319, 20, 2^k.) And by means of the statute of uses, land may be conveyed by the husband to the wife directly, so as to vest in her a *legal title*, namely, by covenanting *with a third person, a stranger*, in consideration of natural love and affection for the wife, to *stand seised to her use*, and so by a like contract for a *valuable consideration*. The *statute* then takes the possession out of the husband and vests it in the wife. (1 Th. Co. Lit. 130; 2 Min. Insts. 856; *Ante*, p. 319, 2^k.)

The wife cannot in like manner convey directly to the husband (except her separate property or by power of appointment), because, save in those cases, no conveyance of a married woman is valid, even in equity, unless made in pursuance of the provisions of the statute upon the subject (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502), one of which is that the husband and wife shall *unite in the conveyance*; and it would be an incongruity, which might give even a court of equity pause, that *husband and wife* should convey to the *husband*; besides that, the wife in such a case would no longer have that protection to her interests which the junction of the husband with her was designed to confer. However, the object is easily attained by the husband and wife uniting, in pursuance of the statute, in a conveyance to a third person, who shall immediately convey to the husband. (Shepperson v. Shepperson, 2 Grat. 501; Switzer v. Switzer, 26 Grat. 583.)

It will easily be apprehended that, since the reason of the inability of husband and wife, respectively, to convey directly, the one to the other, is their *oneness* during the coverture, so when the coverture ceases the inability is at an end. Hence, the wife may take from the husband by devise or will, or by donation *mortis causa*, because none of these take effect until, by the husband's death, the coverture is terminated. And so the husband may take from the wife by similar means, when she, by power of appointment or by reason of a separate estate, is capable of making such dispositions. (1 Th. Co. Lit. 131, 2, n. (9) and (N.); V. C. 1873, ch. 118, § 3; V. C. 1887, ch. 112 § 2513.) And lastly, upon this point, it is

to be observed that husband and wife may respectively convey the one to the other when he or she acts *in auter droit*, by virtue of a power of appointment, or as attorney in fact for a third person; for in such case the interest passes, not from the consort, but from the third person. (1 Th. Co. Lit. 130, and n. (6), 131.)

There is one peculiar sort of separate interest, in the nature of a *separate estate*, which the wife may derive from her husband, which demands some notice, namely, *pin-money*. Pin-money is a provision made by the husband, sometimes by or in pursuance of marriage contract, but more frequently *by gift* from him to the wife, for the specific purpose of supplying her with articles of dress, and with pocket-money, in order to prevent the annoyance of a constant recourse to him with petty demands for personal expenditure. It may consist of gifts of money made from time to time, or of a specific periodical allowance, or of the savings and profits accruing from her domestic management; but in either case, if it is not to the prejudice of the husband's creditors, or if it be by virtue of an ante-nuptial contract, the wife acquires in equity an unimpeachable right of property therein, subject only to *two qualifications*, namely, *first*, that as it is bestowed for the specific purpose of decking her person, for the credit of the common household, the husband has a certain interest in it, as well as the wife, and may demand, perhaps may *constrain*, the expenditure to be made accordingly; and *secondly*, that even though stipulated for by a marriage settlement, she cannot call upon her husband to pay *any arrears*, if he has meanwhile provided for her current wants, nor in any event to pay beyond the arrears of a single year; nor, it seems, can her personal representative demand any arrears at all; for the money is designed to dress and adorn the wife during the year, with a view to maintain the dignity of the husband and his family, and not for the accumulation of the fund. (2 Bright's H. & Wife, 288 & seq.; 2 Stor. Eq. §§ 1375, 1375 a; Slanning v. Style, 3 P. Wms. 337; Acton v. Acton, 1 Ves. Sr. 267; Peacock v. Monk, 2 Ves. Sr. 190; Fowler v. Fowler, 3 P. Wms. 355; Ball v. Coutts, 1 Ves. & B. 305; Howard v. Digby, 8 Bligh. N. R. 269 & seq.) In this particular, a distinction must be noted between *pin-money* and the proper *separate estate* of the wife, of which latter the arrears received by the husband, or not paid by him, are generally demandable by the wife at least for a year, and in full, if the wife has so insisted upon her right as to repel the presumption that she has relinquished the arrears to the husband. But even in case of a *separate*

estate proper, the omission of the wife to make any demand is, in general, proof of such relinquishment of the arrears. (2 Bright's H. & Wife, 261, 259, &c.; Moore's Ex'x v. Ferguson, 2 Munf. 421; Roper v. Wren, 6 Leigh, 38.)

We are next to consider the wife's *power of disposition* over her separate estate, of which a brief and excellent summary is to be found in 2 Bl. Com. 293, n. (12). See also 1 Bish. Marr. Wom. §§ 860, 869, & notes.

In respect to *personal property*, it has been settled for almost, nay indeed for more than, a century, that a married woman being entitled to a *separate estate in chattels*, or in the *produce of lands*, may dispose of it freely, by will or otherwise, precisely as if she were a *feme sole*, save only when it is otherwise provided by the instrument whence she derives the estate. She takes such property with all its privileges and incidents, of which not the least important is the *jus disponendi*. And this principle of free disposition by the wife prevails without regard to the circumstance whether the property be in possession or reversion; and applies as well to the produce and accretions, or savings, as to the principal subject itself. (1 Th. Co. Lit. 132, n. (N.); 2 Bright's H. & Wife, 220 & seq.; 2 Stor. Eq. § 1393; Grigby v. Cox, 1 Ves. Sr. 518; Peacock v. Monk, 2 Ves. Sr. 191; Fettilplace v. Gorges, 1 Ves. Jr. 46, & n. (a); Pybus v. Smith, 1 Ves. Jr. 193 & notes; Rich v. Cockell, 9 Ves. 369; Wagstaff v. Smith, 9 Ves. 520; Sturges v. Corp, 13 Ves. 190; Essex v. Atkins, 14 Ves. 542, 547; Major v. Lansley, 2 Russ. & My. (13 Eng. Chy.) 353; Gore v. Knight, 2 Vern. 535; West v. West's Ex'ors, 3 Rand. 373, 376, 389, 392; Vizomeau v. Pegrarn & al. 2 Leigh, 183; Charles v. Charles, 8 Grat. 486; Nixon v. Rose, 12 Grat. 425; Penn & ux. v. Whitehead, 17 Grat. 503; Burnett & ux. v. Hawp's Ex'or, 25 Grat. 486; Muller v. Bailey, 21 Grat. 321; McChesney & als. v. Brown's Heirs, 25 Grat. 400.)

But as to *real property*, a more rigorous doctrine prevails. If she is not expressly allowed to dispose of that in some designated way, she can do so only *by will* executed as a will of lands is required to be executed (V. C. 1873, ch. 118, §§ 4, 5; V. C. 1887, ch. 112, §§ 2514, 2515); or by deed of conveyance, executed with the formalities prescribed by law for married women. (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502.) And it seems that permitting her to dispose of lands in some other way than as the statute directs does not, without negative words, preclude her from the use of these methods. (Lee & al. v. Bank of U. S. 9 Leigh, 209.)

This latter proposition, however, must be regarded as still undetermined. (*McChesney v. Brown*, 25 Grat. 400, 401; *Burging v. McDowell*, 30 Grat. 244; *Justis v. English*, 30 Grat. 571.) Should the wife omit to dispose of the property in a lawful manner, it devolves upon her heirs, of whom her husband is one only by reason of his being her *next of kin*, or by reason of there being *no blood relations* surviving her. The rents and profits of her separate real estate, however, are regarded as personalty, and of them she has the same absolute disposal as of other separate chattels, namely, as if she were a *feme sole*; unless, indeed, they are invested in lands, in which case the *jus disponendi* becomes circumscribed, as already mentioned in respect to that sort of property. (2 *Bright's H. & Wife*, 224 & seq.; *Peacock v. Monk*, 2 Ves. Sr. 191; *Southby v. Stonehouse*, Id. 610; *Hearle v. Greenbank*, 1 Ves. Sr. 301; *Hodsden v. Lloyd*, 2 Bro. C. C. 534; *Churchill v. Dibben*, 9 Sim. (16 Eng. Ch.) 447, note to *Curteis v. Kenrick*; *West v. West's Ex'or*, 3 Rand. 373, 377, 381, 392; *Vizonneau v. Pegram*, 2 Leigh, 183; *Williamson v. Beckham*, 8 Leigh, 20; *Lee & als. v. Bank of U. S.* 9 Leigh, 200; *Whiting v. Rust*, 1 Grat. 483; *Hume v. Hord*, 5 Grat. 374; *McChesney & al. v. Brown's Heirs*, 25 Grat. 400.)

Wherever the wife is at liberty to dispose of her separate estate, whether inherently, as in the case of personalty, where no restriction is imposed, or by appointment in pursuance of the terms of the instrument creating her separate estate, or in the manner prescribed by law, it is a well-established doctrine in equity that she may bestow it as well upon her husband as upon a stranger, although such transactions between husband and wife are scrutinized with a fitting apprehension of undue influence and with an anxious caution; nor do the courts of equity (supposing the transaction to be brought under their cognizance within a short time after it is entered into), give sanction or effect thereto without first subjecting the wife to a privy examination apart from her husband, or adopting such other precautions as suffice to ascertain her true and unbiased will. (2 *Stor. Eq.* §§ 1395-'6; *Bright's H. & Wife*, 257; *Grigby v. Cox*, 1 Ves. Sr. 518; *Pylbus v. Smith*, 1 Ves. Jr. 189; *Essex v. Atkins*, 14 Ves. 542; *Muller v. Bayly & als.* 21 Grat. 529.)

It is not to be *presumed*, however, in the absence of proof, that any improper influence was employed by the husband to procure the conveyance. (*Shepperson v. Shepperson*, 2 Grat. 501; *Bank of Greensboro v. Chambers*, 30 Grat. 209; *Griffin v. Birkhead*, 84 Va. 617 618.)

It is admitted that a married woman is, in general, incapable during coverture of *charging her person* by any contract or act whatsoever. But her power of disposition, in respect to her separate property, enables her, to a greater or less extent, specifically to *charge her separate estate* in equity, even by implication, with her debts, contracts, and engagements. The English doctrine is that, by entering into such engagements, she must have meant *to effect something*, and as she cannot have expected thereby to charge *her person*, she could have had no other design than to subject to the fulfilment of her undertaking so much of her separate estate as is subject to her *absolute disposal*, as if she were a *feme sole* : and so (*ut res valeat*) her contract or promise must be construed. And this principle is held to apply whether the undertaking be to pay money or to do a collateral thing, and whether it be verbal or written. The principle is also held to extend to the separate personal estate, and the rents and profits of real property payable to the wife for her separate use, save only where such implied charge is contrary to the restrictions imposed by the instrument which created the estate. Thus, where the estates of the wife, consisting of *freehold* and *leasehold* lands, had, by *ante-nuptial* settlement, been conveyed to trustees in trust to receive and pay the profits to the wife, to her separate use, and to convey the estates themselves to such use as she by last will in writing, or by deed or writing, under her hand and seal, executed in the presence of two witnesses, should appoint; and in default of appointment, to the use of her heirs and assigns; the wife having joined her husband as his security in a bond for £180, it was held by Lord Thurlow, in *Hulme v. Tenant* (1 Bro. C. C. 16), that the *leasehold* estates and the rents and profits of the *freehold* were liable, in equity, to pay the bond. And he expressed the opinion that equity, under like circumstances, would subject the wife's separate estate to discharge *any of her general engagements*. The same doctrine was applied in subsequent cases to the wife's acceptance of a bill of exchange, to her promissory note, to her promise to pay her solicitors for professional services, and in short (as was established by Lord Brougham, in *Murray v. Barlee*, and by Lord Cottenham, in *Owens v. Dickinson*), is applicable to all her contracts and engagements, whether written or merely verbal; so that it is incorrect in principle to regard such engagements as operating merely as *appointments*. (2 Bright's H. & Wife, 252 & seq.; *Kinge v. Delevall*, 1 Vern. 326; *Lillia v. Airey*, 1 Ves. Jr. 277; *Hulme v. Tenant*, (1 Bro. C.

C. 16), 1 Wh. & Tud. L. C. 361 to 363; Murray v. Barlee, 3 My. & K. (14 Eng. Ch.) 223; Owens v. Dickinson, 1 Cr. & Phill. (18 Eng. Ch.) 53-'4, and n. (3).)

The doctrine in the United States touching the power of a married woman to *alienate* and to *encumber* her separate property is not uniform. In Pennsylvania, Tennessee, Mississippi, and South Carolina the courts have adopted the rule, sanctioned also by Chancellor Kent, that a *feme covert* has no power over her separate estate but such as has been specially given her, and can neither charge, encumber nor aliene it further or otherwise than as the instrument creating the estate allows. (Ewing v. Smith, 3 Desauss. (S. C.) 417; Meth. Epis. Ch. v. Jaques, 3 Johns. Ch. (N. Y.) 78; 1 Wh. & Tud. L. C. 371, 375.) In New York (independently of statute) the English rule has been, in the main, followed (overruling, in a great degree, Chancellor Kent's views), as to the *alienation* of a wife's separate property; but in regard to the power of *charging the estate for debts*, it is held that where creditors do not claim under any charge or appointment, made in pursuance of the instrument of settlement, they must show that the debt was contracted either for the *benefit of her separate estate*, or for *her own benefit*, upon the *credit of the separate property*. (1 Bish. Marr. Wom. §§ 862, &c., 869, and n. 1; 1 Wh. & Tud. L. C. 374; N. Am. Coal Co. v. Dyott, 7 Pai. 9, 14; S. C. 20 Wend. 570; Curtis v. Engell, 2 Sandf. 287, 289.)

In Virginia, the doctrine as to the *alienation* of the separate estate of a married woman is essentially the same as in England. *Personal* property, settled to her separate use, is at her *absolute and unqualified disposal*, except in so far as she is actually restrained, expressly or impliedly, by the terms of the settlement; and real estate she can only convey in the manner appointed for the conveyance of property by married women (V. C. 1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502), by will (V. C. 1873, ch. 118, § 3; V. C. 1887, ch. 112, § 2514), or by appointment, according to the provisions of the instrument which creates the estate. (West v. West's Ex'or, 3 Rand. 373; Vizonneau v. Pegram & al. 2 Leigh, 183; Williamson v. Beckham, 8 Leigh, 20; Lee & al. v. Bank of U. S., 9 Leigh, 200; Hume v. Hord & al., 5 Grat. 374; Nixon v. Rose, 12 Grat. 425; Penn & Wife v. Whitehead, 17 Grat. 503, 512; Thorndike & als. v. Reynolds & als., 22 Grat. 21; Muller v. Bayly & al., 21 Grat. 521; Burnett & ux. v. Hawpe's Ex'or, 25 Grat. 486; McChesney & als. v. Brown's Heirs, 25 Grat. 400; Hawley v. Twyman, 29 Grat. 728; Burging v. McDowell, 30 Grat. 244; Bank of Greensboro' v. Chambers, 30

Grat. 202; Haymond v. Jones, 33 Grat. 328, 331; Justis v. English, 30 Grat. 571.)

The doctrine with us as to the power to *charge such separate estate with the wife's debts and engagements*, is also now distinctly indicated. If it appear from the terms of the settlement that it was contemplated and designed that the separate property might be charged, it seems that it may be charged accordingly (Muller v. Bayly, &c. 21 Grat. 528-'9); and such power is always incident to the *jus disponendi*, when the latter exists without limitation or restriction. (Bank of Greensboro' v. Chambers, 30 Grat. 209; Justis v. English, 30 Grat. 578; Garland v. Pamplin, 32 Grat. 317.) And as to land as well as personalty, it is considered that it may be made liable for her debts *by implication*, as well as expressly. And seeing that the English doctrine, as expounded by Lord Thurlow, in Hulme v. Tenant, has been so far adopted, there is reason to apprehend that it may receive fully the sanction of our courts (as it has now received it), notwithstanding the grievous imposition to which it exposes married women having separate property, taking from them even that protection which legislation, through the medium of the several statutes against fraud and perjuries, has so industriously flung around the other sex, and persons of either sex who are *sui juris* (whose property can only be charged by clear and unambiguous instruments designed for the purpose); and making trusts for the benefit of married women a very precarious protection to their interests. (Woodson v. Perkins, 5 Grat. 351-'2; Penn & al. v. Whitehead & als. 17 Grat. 503, 512, 516; Burnett & ux. v. Hawpe's Ex'ors, 25 Grat. 488; Darnall & ux. v. Smith, 26 Grat. 878; Leake v. Benson, 27 Grat. 157.)

It is, to be sure, a question of *intention* on the part of the wife; but the intention to charge is *presumed* from the promise or engagement (upon Lord Thurlow's ground in Hulme v. Tenant, that in no other way can her acts have any effect), unless the contrary be made to appear. (Darnall v. Smith, 26 Grat. 834; Leake v. Benson, 29 Grat. 157; Frank v. Lilienfeld, 33 Grat. 397; Garland v. Pamplin, 32 Grat. 317.) In Darnall v. Smith, the contrary was made to appear by the terms of the writing relied on to establish the charge, which was accordingly limited to so much of the separate estate only as was indicated in the writing.

See Justice v. English, 30 Grat. 579; Bank of Greensboro' v. Chambers, 30 Grat. 209 & seq.; Id. 214-'15; Harshberger v. Alger, 31 Grat. 62 & seq.; Garland v. Pamplin, 32 Grat. 317.

It has been all along assumed that restraints *may* be imposed upon the wife, both in respect to *aliening* and *encumbering* her separate estate. The character and extent of those restraints are now to be considered. It is a well-known principle, that it is not in general in accordance with the policy of the law to admit of restrictions upon the alienation of property and the right to charge it to the extent of the incumbrancer's ownership at law or in equity. (*Brandon v. Robinson*, 18 Ves. 429; *Woodmeston v. Walker*, 2 Rus. & My. 197; *Brown v. Powell*, 5 Sim. (7 Eng. Ch.) 663.) But in the case of married women, equity, in introducing the anomaly of a separate estate in the wife, found it needful, or at least thought fit, to enforce, in respect to such separate estate, severe restrictions upon that freedom of disposition which usually attaches inherently to all property; that is, as in equity she acquires by the settlement certain faculties, unknown to the common law, to act as a *feme sole*, so the nature and extent of those peculiar faculties are to be collected from the terms of the instrument out of which they arise. Such restrictions may be imposed in respect to the *mode* of disposition, as that it shall be by *deed only*, or by *will only*, or by *writing* attested by one or by any number of witnesses, and not otherwise; or they may have reference to the *anticipation* of the income; or they may involve an absolute prohibition to aliene, or to encumber at all, whilst the woman continues a *feme covert*. (2 Bright's H. & Wife, 274 & seq.; *Jackson v. Hobhouse*, 2 Meriv. 483; *Parker v. White*, 11 Ves. 209, 221; *Pybus v. Smith*, 3 Bro. C. C. 347; *Barton v. Briscoe*, 1 Jac. (4 Eng. Ch.) 603; *McChesney v. Brown*, 25 Grat. 393; *Burnett v. Hawpe*, Id. 481; *Darnall v. Smith*, 26 Grat. 878; *Frank v. Lilienfeld*, 33 Grat. 378, 399.)

The intention to restrict, and especially to prevent "anticipation" of the income, must plainly appear, for *prima facie* the *jus disponendi* is incident to the separate property of the wife, as to all other property. Hence it is not enough, in order to produce this effect, to direct that the "profits shall be paid from *time to time* into the *proper hands* of the wife," which means no more than to confer a separate estate; nor that the "profits shall be paid to such persons, and in such manner as the wife shall from *time to time*, during her life, notwithstanding her coverture, by any note or writing appoint, and in default of appointment, into her *proper hands*, for her separate use;" nor that the profits should be paid, "as the same *become due and payable*, into the hands of the wife, and *not otherwise*; and the *receipts of*

the wife alone for what should be actually paid into *her own proper hands*, should be a sufficient discharge." (Pybus v. Smith, 1 Ves. Jr. 189; S. C. 3 Bro. C. C. 340, n. (1); Clarke v. Pistor, 3 Bro. C. C. 346, n. †; Parker v. White, 11 Ves. 222; Acton v. White, 1 Sim. & Stu. (1 Eng. Ch.) 429; Medley v. Horton, 14 Sim. (37 Eng. Ch.) 222; McChesney v. Brown, 25 Gratt. 393; Burnett & ux v. Hawpe, Id. 481.)

On the other hand, such restriction upon alienation, and upon the anticipation of the income, is held to be created by a direction that the trustee "*shall receive the income of the property when and as often as the same shall become due, and pay it to such person as the wife shall from time to time appoint, or permit her to receive it for her separate use, and that her receipts, or the receipt of any person to whom she may appoint the same after it shall become due, shall be a valid discharge;*" and *a fortiori* by an express prohibition to the effect that the subject "*shall not be sold or mortgaged*"; or by a direction to the trustees to pay the "profits to such person, and for such purposes as she by any writing, notwithstanding her coverture, from time to time, when and as the same *shall become due, but not by way of assignment, charge, or other anticipation thereof*, may direct or appoint, and in default of appointment, into her own proper hands, for her separate benefit, free from the debts and control of her husband; for which purpose the receipts in writing of the wife, or of her appointee as aforesaid, shall, notwithstanding her coverture, be an effectual discharge"; or by a direction to pay the "profits to such persons as the wife shall by writing (except *in any mode of anticipation*) appoint, and in default of appointment, into her own hands, for her separate use." (2 Bright's H. & Wife, 278 & seq.; Field v. Evans, 15 Sim. (38 Eng. Ch.) 375; Steadman v. Poole, 6 Hare, (3 Eng. Ch.) 193; Harnett v. Macdougall, 8 Beav. 187; Moore v. Moore, 1 Coll. (28 Eng. Ch.) 57; Baggett v. Meux, 1 Phil. (19 Eng. Ch.) 628.)

Clauses restraining anticipation operate *only during coverture*; for whilst equity upon occasion will modify, in case of its creature, the separate estate of a married woman, the doctrines in general applicable to property, yet as soon as the wife becomes *dis-covert*, the right of alienation, which is incident to ownership, immediately resumes its full force. The imposition upon alienation of a fetter unknown to the common law is permitted so far as the power is created by equity, but no farther. It has, therefore, been made a question whether such restrictions might be lawfully imposed by a settlement

made before marriage, or in reference to any subsequent marriage which might be thereafter contracted by the woman. And this question was at first resolved in the negative, in more than one case (as in *Newton v. Reid*, 4 Sim. (6 Eng. Ch.) 141; *Brown v. Pocock*, 5 Sim. (7 Eng. Ch.) 663; *Massey v. Parker*, 2 My. & K. (7 Eng. Ch.) 174); but the obvious inconvenience of such a solution, as, for example, in making it impracticable for a father to *secure* a support for his unmarried daughter, against the improvidence of a *future* husband, has led to the final establishment of the doctrine that, whilst clauses in restraint of alienation, by anticipation or otherwise, will not extend beyond an existing coverture, unless it be clearly so intended, yet such restrictions, when plainly applicable to a future coverture, are valid; but with this qualification, that during any intervening *dis-coverture* the power of alienation is necessarily complete. If, however, the wife, whilst thus *dis-covert*, makes no disposition of the property, the restraining clause, which was suspended during that period, upon her subsequent marriage will again come into operation. (2 Bright's H. & Wife, 285 & seq.; *Tullett v. Armstrong*, 1 Beav. (17 Eng. Ch.) 1; S. C. on Appeal, 4 My. & Cr. (18 Eng. Ch.) 377; *Knight v. Knight*, 6 Sim. (9 Eng. Ch.) 121.)

It is worthy of note that it is competent for one to settle property on trustees in trust to manage the same, and to receive the profits, and to apply them to the support of a husband and wife and their children during the joint lives of the husband and wife, and the life of the survivor, remainder to their children; and that in such case neither the trustee nor the *cestuis que trust* can pledge the *prospective* profits of the trust estate necessary for the current support of the *cestuis que trust*, to the payment of any debt contracted for their past support, although the debt were contracted by the trustee himself, or by one or all of the *cestuis que trust*. (*Markham v. Guerrant & al.*, 4 Leigh, 279, 285-'6; *Bank of Greensboro' v. Chambers*, 30 Grat. 213, 214.) Otherwise, the object in view would be effectually frustrated, that object being not merely to intercept the marital rights and to shield the property from the husband's creditors, but to shield it from the improvidence and waste of the husband and his family, and to make that which, under their management, would have been dissipated in a short time, a permanent fund, which should, from its profits, furnish some support to the family during the life of the father and mother, and then be divided among their children. The parties thereby gained a

vested interest, to be enjoyed *jointly*, and neither the husband nor any other of the *cestuis que trust* has, during the continuance of the trust, any such *separate interest* therein as can be subjected by the creditors of any of them. If the parties are all *sui juris*, they can, no doubt, by unanimous consent, dissolve the trust and sell the property, whether it be real or personal: and if some of them are infants, a court of chancery, at least in Virginia, might, it is believed, consent for the infants, if it were deemed for their benefit, and might direct the appropriation of the proceeds, even of land, to their support. (V. C. 1873, ch. 124, §§ 2 & seq.; Id. ch. 123, § 13; V. C. 1887, ch. 117, §§ 2616, &c.; Id. ch. 116, § 2609.) But without such unanimous consent, it seems that the property must be enjoyed as it is given, and not otherwise. (Markham v. Guerrant, 4 Leigh, 285; Scott & ux. v. Gibbon & als., 5 Munf. 90; Roanes v. Archer, 4 Leigh, 550, 568; Perkins v. Dickinson & Co. 3 Grat. 337; Johnston v. Zane's Trustees, 11 Grat. 552, 570; Crawford's Ex'ors v. Patterson, 11 Grat. 370; Nickell & als. v. Handley, 10 Grat. 336, 340; Armstrong's Adm'r & als. v. Pitts, &c. 13 Grat. 241.) Hence, where the apparent leading intent is to provide and secure *a home*, and a support and maintenance for the wife and the expected children, the wife can make no disposition of the property, nor impose any charge upon it which shall conflict with that paramount purpose; notwithstanding there may be no *express* interdiction of, or limitation on, the *jus disponendi*; and although a *change of investment*, upon the written request of the wife, shall be, *in terms*, authorized. Such re-investment must not lose sight of the principal object of providing and securing *a home*, as well as a support and maintenance for the wife and family; and therefore, to obtain an advance of money, on the credit of the separate property, to be used in business, especially hazardous business, can in no just sense be called *an investment*, under the terms of such a settlement; and such a transaction is therefore invalid. (Bank of Greensboro' v. Chambers, 30 Grat. 214, 215.)

The doctrine of the *wife's separate estate* is neatly summed up by Lord Chancellor Cottenham in Tullett v. Armstrong, 4 My. & Cr. (18 Eng. Ch.) 405, in pronouncing his judgment extending the protection of equity to the separate estate, with the qualifications and restrictions attached to it, throughout a subsequent coverture. "When this court," says he, "first established the separate estate, it violated the (existing) laws of property as between husband and wife; but it was

thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation. In the case now under consideration, if the *after-taken* husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why, then, should not equity in this case also interfere; and if it cannot protect the wife consistently with the ordinary rules of property, extend its own (peculiar) rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so *invented for her benefit*? It is, no doubt, doing violence to the rules of property to say that property which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it; but it is not a stronger act to prevent the husband from interfering with such property than it was originally to establish the separate estate, or to maintain the prohibition against alienation. In doing this I feel that I have much to overcome, of which the observations thrown out by myself in *Massey v. Parker* (2 My. & K. (7 Eng. Ch.) 174) is the only part of which I do not feel the important weight. I have to contend with Lord Brougham's observations, in *Woodmeston v. Walker* (2 Rus. & My. 197), and the vice-chancellor's decisions in *Newton v. Reid*, 4 Sim. (6 Eng. Ch.) 141; *Brown v. Pocock* (2 Rus. & My. 210); *S. C.* 5 Sim. (17 Eng. Ch.) 663; *Malcolm v. O'Callaghan*, (4 My. & Cr. (18 Eng. Ch.) 399); *Johnson v. Freeth*, 6 Sim. (9 Eng. Ch.) 423, n; and *Davies v. Thornycroft*, 6 Sim. (9 Eng. Ch.) 420.

"In establishing the validity of the separate estate, with its qualifications (which constitute its value), that is, the prohibition against anticipation, I am not doing more than my predecessors have done for similar purposes."

Another anomaly must be noticed in respect to a married woman's separate estate. At common law, upon the grant of an estate of inheritance, whether legal or equitable, to a married woman, her husband's right to curtesy cannot be excluded, when the required circum-

stances concur; but a married woman's "*separate estate*" may be so limited as to give her the inheritance, and yet exclude her husband from curtesy. (Chapman v. Price, 83 Va. 394 to 396; Cooper v. Macdonald (L. R. 7 Ch.) 300), 23 Moak's Eng. Reps. 585; Taylor v. Meads (4 De Gex. J. & S.), 69 Eng. Ch. 604 & seq.; 1 Sugd. Pow. (3d Am. ed.) 206.)

It is proposed to advert to but one more topic connected with this equitable doctrine of the wife's separate estate, namely: her *separate trading* with such estate, together with her own and her husband's liability, respectively, in consequence thereof.

It is established that a married woman may engage in trade on her separate account, and may enter into a partnership for that purpose, by the *consent of her husband*. When the husband agrees *before marriage* that the wife may carry on business on her separate account, the marriage is a valuable consideration, and the agreement will be maintained as well against the husband's creditors, that is, his subsequent creditors, as in respect to himself (V. C. 1887, ch. 109, § 2459); if made *after marriage*, it is always good as against the husband, and if founded on valuable consideration, prevails against his creditors also. If *trustees* be interposed, the wife's transactions, in her trading operations, will be considered as conducted by the wife, as *their agent*, her possession will be regarded as their possession, and the increase and profits of the trade will accrue to them for her sole and separate use and benefit. The trustees will then be entitled to *recover at law*, upon all demands accruing due in pursuance of the wife's operations, and will be answerable *at law* for all liabilities arising out of the same, with this qualification: that if the wife takes a security payable *to herself*, without describing herself as agent, the husband alone can sue upon it *at law*, although in equity the trustee or the wife may recover upon it; and if she execute a security in her own name, and not as agent, no action at law can be maintained thereon; but the remedy is either at law, upon the implied contract of the trustee, or in equity against the wife's separate estate. But if, on the other hand, there are *no trustees*, but the trade is conducted merely by the consent of the husband, with the wife's separate estate, the husband will stand as trustee, having the same rights and being subject to the same liabilities as a trustee, as in equity the rights of the wife, and the liability of her separate estate, would also be the same as before. But in no case will any *personal liability attach to her*. And so, if the husband desert his wife, and she by the *aid of*

her friends is enabled to carry on a separate trade (as that of *milliner*), her earnings in such trade will be protected in equity against the claims of her husband, apparently because what she gets from her friends is her *separate property*, and his assent to her embarking in business on her own account is implied from his desertion. It seems, however, that the mere circumstance of the husband's absenting himself, or permitting her to trade separately, will not alone, and without other circumstances, divest him at common law of his interest in what she may thus acquire. (2 Bright's H. & W. 293 & seq.; Id. 299, 300; 2 Stor. Eq. §§ 1385 to 1387; Jarman v. Wolloton, 3 T. R. 618, 620, *in notes*; Dean v. Brown, 5 B. & Cr. (11 E. C. L.) 336; Barlow v. Bishop, 1 East. 432; Saville v. Sweeney, 4 B. & Ad. (24 E. C. L.) 514; Gore v. Knight, 2 Vern. 535; Cecil v. Juxon, 1 Atk. 278-'9; Lampher v. Creed, 8 Ves. 599; Penn & als. v. Whitehead & als. 17 Grat. 503; Penn v. Whitehead, 12 Grat. 74.)

We have seen that, in the separate estate arising under the ill-omened statute of April 4, 1877 (Acts 1876-'77, p. 333, ch. 329; V. C. 1887, ch. 103, §§ 2284 & seq.), known as "The Married Woman's Law," in the case of every marriage occurring, and all property accruing to a married woman since that date, the wife seems to be permitted, by the tenor of the act in question, to become a *sole trader*, without regard to the husband's consent, although he is liable for the debts which she may contract in carrying on the business! (*Ante*, p. 339.) But by the revival of 1887, whilst the wife is allowed, without reference to her separate estate, to engage in trade for her own use and benefit in any case (but *not as a partner* with her husband), in the same manner as if she were unmarried (V. C. 1887, ch. 103, § 2287), yet it is expressly provided that no contract made nor liability incurred by the wife shall render the husband or his estate responsible therefor. (V. C. 1887, ch. 103, § 2290.)

As to the ultimate liability of the trustee, or of the husband, for debts contracted by the wife in her separate trading operations, other than in pursuance of the statute of 1877, they will be respectively relieved in equity *to the extent of the wife's separate estate*; and according to some authorities the creditors will be in all cases confined to the assets employed in the separate trade. This, however, is not in conformity with the analogy of fiduciaries generally, who, if they, or others for them, incur debts in the execution of their trusts, are not, as to the creditors, relieved from their personal responsibility, except so far as the trust fund suffices to

exonerate them. But, of course, if there be trustees named, the personal responsibility, if any, is their's, and not the husband's, who is absolved from all liability for the debts contracted. (2 Bright's H. & Wife, 301.)

If the husband furnish to the business conducted by the wife on her separate account, labor, skill, capital or credit, he is to that extent entitled to share in the profits, and his creditors may subject the same to their debts. But of course there are no profits until the creditors of the concern are all paid, nor until the expenses of conducting the business, including the support of the husband, wife and family, are liquidated. (Penn & als. v. Whitehead & als. 17 Grat. 503, 517.)

4^k. Husband and Wife, *Tenants by Entireties*.

When land is conveyed to a man and a woman, and their heirs, they thereby become *joint-tenants* in fee simple, and if they afterwards intermarry, they continue notwithstanding, to be joint tenants as before. But when the conveyance is made *during the coverture*, to husband and wife jointly, they have neither a joint estate, nor a sole several estate, nor an estate in common, but their interest is denominated a *tenancy by entireties*. From the unity of their persons by marriage, they have each the whole estate in the premises entirely as one person; and at common law, on the death of either of them, the entire tenement, for all the estate or interest therein, belongs to the other; and neither of them alone *has power to aliene* to the prejudice of the other's right. Hence, where lands were by will devised to husband and wife, and their heirs, forever, and the wife died, leaving issue, the husband surviving, at common law, takes the whole. (1 Th. Co. Lit. 740, & n. (L.); 2 Bl. Com. 182; Back v. Andrews. 2 Vern. 120; Green v. King, 2 W. Bl. 1213; Doe v. Parratt & ux. 5 T. R. 654; Thornton v. Thornton, 3 Rand. 182; Norman's Ex'x v. Cunningham, &c. 5 Grat. 63; 2 Min. Insts. 404, 410-'11.)

So essentially different is a *tenancy by entireties* from a joint-tenancy, that the statute in Virginia which abolished the doctrine of *survivorship* as to *joint-tenants* was held not to be applicable to *tenants by entireties*; but notwithstanding that statute, the survivor in the case of tenants *by entireties*, was held to be *entitled to the whole*. (Thornton v. Thornton, 3 Rand. 182; Norman's Ex'x. v. Cunningham, 5 Grat. 63); but the Code of 1850 in Virginia abolished survivorship in case of *tenancy by entireties* also, where the estate was *one of inheritance*, and was created by deed or will, *after 1st July, 1850*. "If hereafter," says the statute, "an estate of inheritance be conveyed or devised to a husband and his wife, one moiety

of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower, as the case may be." (V. C. 1873. ch. 112, § 18; Id. ch. 209, § 1.) So that if the estate conveyed or devised to husband and wife be an estate *for life*, or *for years*, or if it were conveyed or devised prior to July 1st, 1850, the *survivor would still take the whole*. (Zollman v. Moore, 21 Grat. 328.)

The language of the Code of 1887 avoids this needless discrimination between estates of inheritance, and lesser estates, by enacting that "*If hereafter*," (*i. e.* after May 1st, 1888), "*any estate*, real or personal, be conveyed or devised to a husband and his wife, they shall take and hold the same *by moieties* in like manner as if a distinct moiety had been given to each by a separate conveyance." (V. C. 1887, ch. 107, § 2430.)

2^d. The Effect of Marriage *as to Third Persons*.

The effect of marriage, in respect to third persons, is chiefly determined by two considerations, namely, that the existence of the wife is, for most *civil* purposes, merged in that of the husband, so that for such purposes they constitute together but one person; and *secondly*, that the husband's influence over the wife is so great as to deprive her, for the most part, of *freedom of will*.

W. C.

1st. Effect, *as to Third Persons*, of the Wife's Ante-nuptial Contracts.

The debts and other contracts of the wife *before marriage* are *at common law* chargeable on the husband, provided a judgment for them against husband and wife is recovered *during the coverture*, for the judgment alters the debt, and makes it *the husband's*. In Virginia, however, at present, by statute, the ante-nuptial debts of the husband are not chargeable on the property derived from the wife, nor is the husband's property, even during coverture, charged with the ante-nuptial debts of the wife. (Acts 1874-'5, p. 442, ch. 359; Acts 1876-'7, p. 333, ch. 329; V. C. 1887, ch. 103 §§ 2285, 2290.) But supposing no judgment obtained during the coverture, the husband is not, *as such*, by the common law, chargeable, at law or in equity, with the ante-nuptial debts of the wife after her decease, nor is his estate, should she survive, not even though he had a large portion with her; as, on the other hand, he is during the coverture liable to all her ante-nuptial debts, although he did not get a shilling with her; nay, although, by ante-nuptial agreement, no part of her property came to him, but was secured to herself. (Heard v. Stamford, Cas. T. Talbot, 173; Powell v. Manson, 22 Grat. 194.) So if a man marries an executrix or an administratrix who has wasted the assets of the

estate (which is called a *decastarit*) he is, during the coverture, answerable therefor; and if any of the assets of the estate represented by his wife come to his hands, he is to that extent chargeable in equity, even after the coverture ended. And this common law doctrine of marital liability applies as well to judgments against the wife *while sole* as to other debts. Unless there be judgment upon a *scire facias* against the husband and wife during coverture, the husband surviving is not charged therewith, nor his estate if she survives. It exemplifies the tenacity with which this principle is adhered to, that a husband is held, even in equity, to be not answerable, after the determination of the coverture, for the price of the very goods of which, as husband, he is then in possession. (Bac. Abr. Bar. & F. (F.); *Woodyer v. Gresham*, 1 Salk. 116, pl. 7; *Obryan v. Ram*, 3 Mod. 186; *Thomund v. Suffolk*, 1 P. Wms. 461, 469; *Heard v. Stamford*, 3 P. Wms. 411.)

Evidence of the wife's confession, made after marriage, of her ante-nuptial debt, is not admissible to charge the husband; and yet if the husband die, the wife surviving, or a divorce *a vinculo matrimonii* be obtained before the debt is recovered, the wife is liable. (Bac. Abr. Bar. & F. (F.); *Woodman v. Chapman*, 1 Campb. 189; *Sheppard v. Starke*, 3 Munf. 29.)

It may be expedient to add here, that where the cause of action on which the *suit is brought* arose before the marriage, the husband and wife *must always be joined* as defendants; and that is still true, even in Virginia, by the express provision of the statute of March 31, 1875. (Acts 1874-5, p. 443, ch. 359.) Notwithstanding, it proceeds to declare that the execution shall issue against, and the judgment or decree shall only bind the property of the wife. (Bac. Abr. Bar. & F. (F.); *Mitchinson v. Hewson*, 7 T. R. 351; *Richardson v. Hall*, 1 Bro. & B. (5 E. C. L.) 50.)

The effect of the revisal of 1887 seems to be to do away with the husband's joining the wife in the action in such cases. (V. C. 1887, ch. 103, §§ 2290, 2288.)

But whilst the husband's liability, as such, in respect to the wife's ante-nuptial contracts, is limited to the duration of the coverture, save where a judgment has been obtained during that period, yet in general, if the husband has any assets in his hands as her administrator (as in case of her *choses in action* not reduced into possession during the coverture), *they may still be subject to such contracts*. This, however, would not be so if the husband, by marriage-settlement, had become (as he might be) the *purchaser* of the *choses in action* in question. The extent of such a purchase depends upon the terms of the settlement, according to which it may embrace all of the wife's estate, as well

what may accrue to her afterwards as what she is entitled to at the date of the settlement, although the inclination of the authorities is to restrict his rights, as purchaser, to *existing interests*, unless the contrary intent be clearly manifested. (*Garforth v. Bradley*, 2 Ves. Sen'r 677; *Mitford v. Mitford*, 9 Ves. 87, 95; *Carr v. Taylor*, 10 Ves. 579.)

2^g. Effect of Contracts made by the Wife *during Coverture*; W. C.

1^h. Effect of Wife's Contracts during Coverture, *as respects Herself*.

Let us consider, (1), The effect of *contracts executory*, made by wife during coverture; and (2), The effect of *contracts executed* (or *conveyances*) made by or to wife during coverture;

W. C.

1ⁱ. Effect of *Contracts Executory*, made by Wife *during Coverture*.

The law considers husband and wife as but one person, the very existence of the wife during the coverture being, in legal contemplation, merged in that of the husband. For this reason, and also because she is supposed to act under his constraining influence, not to say *coercion*, she is, at common law, for the most part incapable of binding herself by any contract or conveyance whatsoever. And this doctrine, so far as relates to *contracts executory*, was unqualified by any statute, until the late Revisal, by which it is enacted that upon contracts touching her separate trade or business and as to all matters connected therewith, "and upon contracts and *liabilities* made or incurred before her marriage, she may sue and be sued in the same manner, and there shall be the same remedies in respect thereof for and against her and her separate estate as if she were unmarried. (V. C. 1887, ch. 103, § 2288.) But by the next section it is provided that any judgment or decree against her, though it is declared to be "*personal*," yet can be enforced *only against her separate estate*. (V. C. 1887, ch. 103, § 2289.) The principle applies in general, in full force, notwithstanding the parties are living separate, in pursuance of a deed of separation, or even though they are divorced *a mensa et toro*, unless the divorce is accompanied, agreeably to the statute, by a decree of *perpetual separation*, when, it will be remembered, it has, upon the personal rights and legal capacities of the parties, the same effect as a divorce *a vinculo*, save that neither party may marry again during the life-time of the other. (V. C. 1873, ch. 105, § 13; V. C. 1887, ch. 101, § 2264.) There are, however, certain exceptional cases recognized by the law, where a married woman is regarded as having acquired a separate charac-

ter, and is enabled to contract as if she were a *feme sole*, in which cases she may also sue and be sued without joining her husband. These cases are the following, namely:

(1), Where the wife is a *sole-trader*, by the *custom of London*.

This exception, of course, does not exist in this country, as a *custom*; but by the married woman's law, as contained in the recent Revisal, a married woman's contract as a *sole-trader*, is binding, as we have just seen, although enforceable only against her separate property. (V. C. 1887, ch. 103, §§ 2288, 2289.)

(2), Where the husband is *civiliter mortuus*, or civilly dead.

Civil death is the state of a person who, though possessed of natural life, has lost all his civil rights, and as to them is considered as dead, so that his will, if he be capable of making one, is admitted to probate, etc. The modes of civil death existing at common law are these: (1), Attainder of treason or felony; (2), Banishment from, or abjuration of the realm; and (3), Entering into religion, *i. e.*, becoming a *monk professed*. None of which appear to be known to the law of Virginia, so that it is believed that there is with us *no such thing as civil death*. (See *Ante*, p. 68.) It must be observed, however, that authorities are not wanting that banishment of the husband, or his being sentenced to the penitentiary, or even his voluntary abandonment of the wife, has the same effect in restoring her competency to contract as a civil death. (1 Pars. Cont. 306; *Rhea v. Rhenner*, 1 Pet. 108.)

(3), Where the husband is an *alien enemy*; or

(4), Where the husband *is an alien*, and has *never been in this country*.

This last, though sustained by the weight of authority, is not a little discredited by *Borden v. Keverberg*, 2 M. & W. 64, and *Jones v. Smith*, 3 M. & W. 527.

See 1 Bl. Com. 443, and n. (44); Bac. Abr. Bar. & F. (I.) & (M.); *Compton v. Collinson*, 1 Hen. Bl. 350; *Beard v. Webb*, 2 Bos. & Pul. 105; *Marshall v. Rutton*, 8 T. R. 345, 547; *Kay v. Duchesse de Pienne*, 3 Campb. 124; *Deerly v. Duchess of Mazarine*, 1 Salk. 116; S. C. 1 Ld. Raym. 147; *Gregory v. Paul*, 15 Mass. 31; *Abbott v. Bailey*, 6 Pick. 89.

The liability in equity of the wife's *separate estate* to make good her contracts made during coverture, discussed under a previous head, is no exception, it will be remembered, to the doctrine of a married woman's incapacity to *bind herself*; but on the contrary is a direct corollary therefrom. (*Ante*, pp. 353 & seq.)

A married woman's contract being *not voidable*, but

actually *void*, is incapable of confirmation after she becomes *dis-covert*, and, therefore, does not even afford a valuable consideration to support a substantive promise made by her after the coverture has ceased. In order that such subsequent promise may be binding on her, there must be some new valuable consideration, actual or implied (as where the new promise is under seal, or in the form of a mercantile security); unless, indeed, where the goods were furnished, during the coverture, *on the faith of her separate estate*. (1 Pars. Cont. 361, and cases cited.)

2^d. Effect of *Contracts Executed* (i. e., *Conveyances* made) by or to the Wife during Coverture; w. c.

1^k. Effect of Conveyances made during Coverture *by the Wife*.

A conveyance made by a *feme covert*, otherwise than by virtue of a power of appointment, is at common law *absolutely void*, and not merely *voidable*, and that for the two reasons already mentioned, namely, *first*, because the separate existence of the wife is *extinguished by the coverture* for civil purposes; and *secondly*, because she is justly considered to be so much under the influence of the husband as to have, in matters of business, *no will of her own*. The necessities of society, however, so imperatively required that married women should be enabled on occasion to alienate property belonging to them, that, in the absence of legislation, a remarkable device was resorted to in order to accomplish the purpose. This was what is called a *fine*, because it puts an end (*finis*) not only in this, but in other cases where it was used, to all disputes and controversies touching the subject matter. It was founded, as to married women, upon the idea that, although a woman so situated was, for the reasons mentioned, incapacitated *to convey*, yet still, in the interest of adverse claimants, she was *liable to be sued* (together with her husband), and thus to have asserted against her any demand which might exist, in like manner as if she were a *feme sole*, save only that the husband must be joined with her.

The plan of the *fine*, therefore, was that a suit (real, but collusive), should be instituted by the intended purchaser against her, as if *in invitam* (her husband being a party with her, of course), the purchaser affecting to claim the land by a title paramount to her's. Thereupon, leave to *agree the suit* is obtained, and a compromise is submitted, whereby the defendants (the husband and wife) acknowledge the subject in question to be indeed the property of the complainant (the intended purchaser). But before the court will allow this adjustment,

or *concord*, as it is called, to be entered of record, the *feme covert* must be examined privily and apart from her husband, by the court, or one of the judges, or else by certain functionaries appointed as commissioners for the purpose, in order to determine whether she enters into the transaction willingly and freely, or by compulsion of her husband. The judgment of the court is then entered accordingly, ascertaining the land to be the *property of the intended purchaser*; and thus, by this round-about contrivance, both obstacles to the conveyance are obviated; the *oneness* of the wife with the husband *by the suit*, apparently *in invitam*, and the supposed constraint of his influence, *by the privy examination*. A similar result might also have been effected by the more recently invented, but very similar device of *common recoveries*. (1 Bl. Com. 444; 2 Do. 293, 348 & seq., 357 & seq.; Id. App'x, 449; 2 Th. Co Lit. 219. & n. (F.); Id. 610, n. (1); 1 Do. 133; 2 Min Insts. 581, 903.)

A mode of conveyance so cumbrous and expensive as that by *fine* or *common recovery* was not at all adapted to the infant settlements in Virginia, so that at an early period (A. D. 1674, 2 Hen. Stats. 317) the colonial assembly gave the sanction of law to an already prevailing usage, whereby a married woman's conveyance was made by ordinary deed, accompanied by the privy examination of the wife, apart from her husband, by certain designated functionaries, a method generally prevalent in the United States, and so obviously inconvenient that it has at length been recently introduced by several statutes into England, (3 & 4 Wm. IV., c. 74; 8 & 9 Vict. c. 106; 19 & 20 Vict. c. 108.) See Wms. Real Prop. 47, 212-213.

This statutory method of conveyance by married women, being in the nature of an *exception* to the common law, must be rigorously observed; and every transaction which does not conform substantially to the requirements of the statute is *totally void*. Those requirements, in brief, prior to the late revival were that the instrument shall be an instrument of *conveyance of property*, real or personal, and not a power of attorney, or an executory contract of any sort; that both *husband and wife shall be parties* thereto, and shall *sign it*; that the acknowledgment of the wife shall be made *before the functionaries* named in the statute; that the *certificate* of the authorities thus invoked shall state that the wife *was examined privily* and apart from her husband, and that the writing in question was *explained to her*; that she acknowledged the same to be *her act and deed*, and declared that she had *willingly executed the same*.

and *wished not to retract it*; and finally, that the writing shall be *duly registered or recorded* as to the husband as well as the wife; and then, says the statute, "Such writing shall operate to *convey from the wife* her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which, at the date of such writing, she may have in any estate conveyed thereby, as effectually as if she were at the said date *an unmarried woman*; and such writing shall *not operate any further* upon the wife or her representatives by means of *any covenant or warranty contained therein*." (V. C. 1873, ch. 117, §§ 4, 7; 2 Lom. Dig. 469 & seq.; Bac. Abr. Bar. & F. (I.); 2 Min. Insts. 581, 838.)

It should be observed that the foregoing principles are applicable specially to a conveyance by a married woman of a *legal or equitable title to her own lands*, or other property other than such as she holds to her *separate use*, or to an *interest* in the lands of her husband; and they require to be modified in their application, as we have seen, to conveyances executed by her as *attorney in fact* for her husband or any other person, or by virtue of a *power of appointment*, or of her *separate estate*. (1 Th. Co. Lit. 132, n. (N.); *Ante*, p. 329.)

The Code of 1887 dispenses with the privy examination of the wife, and the explanation to her of the writing, and requires only that the husband and wife shall both be parties to the conveyance, and that it shall be admitted to record as to each of them according to the provisions applicable to the registry of any other writings, contained in V. C. 1887, ch. 111, §§ 2500 and 2501. And it is declared that when it is so admitted to record as to the husband as well as the wife, it shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives, all right, title and interest of every nature which at the date of such writing she may have in any estate conveyed thereby, as effectually as if she were at the said date *an unmarried woman*. Such writing shall not operate any further upon the wife, or her representatives, by means of any covenant or warranty contained therein, which is not made with reference to her separate estate as a source of credit, or which, if it relates to her said right of dower or to any estate or interest conveyed other than her own, is not made with express reference to her separate estate as a source of credit. (V. C. 1887, ch. 111, § 2502.)

And these provisions are not to be so construed as to impair or affect any right or power of a married woman

by her *sole act*, in virtue of V. C. 1887, ch. 103, to convey any estate, real or personal, which is made her separate estate by that chapter: and any writing which is to be or may be recorded, signed by a married woman, though not signed by her husband, conveying any separate estate, real or personal, may be admitted to record as to her, according to V. C. 1887, ch. 111, §§ 2500, 2501, as if she were unmarried. (V. C. 1887, ch. 111, § 2503.)

Whilst hitherto the statute did not allow of a married woman's making an *executory contract* to convey her lands, nor a *power of attorney* authorizing an agent to convey, an Act of Assembly of March 6, 1890, permits both. (Acts 1889-'90, ch. 238, p. 193.)

2^k. Effect of Conveyance made during the *Cverture to the Wife*.

A conveyance made *to a married woman* stands upon a different footing from one *made by her*. The latter, as we have just seen, is, with certain qualifications, *void in toto*; but as to the former, a wife is admitted to be of capacity to purchase of other persons than her husband without his consent, and, as we have seen, may, in equity, or through the intervention of trustees, take from the husband himself. The transaction being *prima facie* for her benefit, although capable of being avoided by her, or in her behalf, is yet *not void*. Thus, the husband may disagree to a conveyance made by a third person to his wife, and so divest the whole estate: but if he neither agree nor disagree, the purchase is good. Yet after his death, albeit he agreed thereunto, she may, says Lord Coke, "without any cause to be alleged, waive the same; and so may her heirs also, if after the decease of her husband she herself agreed not thereunto." (1 Th. Co. Lit. 132-'3; Bac. Abr. Bar. & F. (I.); Barnfather & al. v. Jordan & al. 2 Dougl. 452.)

2^h. Effect of Wife's Contracts during Cverture *as Respects the Husband*.

We have seen that, by the rules of the *common law*, a married woman has, in general, no power to *bind herself* by contract, or to acquire to herself, and for her exclusive benefit, any right to a contract made with her. All her contracts made during the coverture are for her husband's benefit, and all her earnings enure to him, as do also all gifts or grants of chattels to her which are not limited to her *separate use*. Hence, where a married woman's earnings are invested in land which is conveyed to a trustee for her *separate use*, but without any agreement, either ante-nuptial or post-nuptial, on her husband's part, that she should be entitled to her earnings, and the husband had not deserted her, the real estate thus purchased is his,

and is subject to pay his debts. (1 Bright's H. & Wife, 34; Penn v. Whitehead, 17 Grat. 527; Campbell v. Bowles, 30 Grat. 662-3.) And so, if by his authority, or without it, if he ratifies the transaction, she sells property, her husband is to recover the price. But wherever she is the meritorious cause of the debt due (as when it is *for her services*), the husband may at his option sue alone, or join her in the action (in which last case, if he should die before recovery of the demand, it would survive to her). Whether when the wife contracts in her own name, and not in that of her husband, and the other party is not even aware that she is a married woman, the husband may avail himself, according to the doctrines of *agency*, of the contract, without a new assent on the other side, admits of question. There seems, in such case, to be a want of mutuality, which would make the agreement wholly inoperative. (1 Bl. Com. 442-3, and n. (42), (43).)

By the Code of 1887, a married woman may engage in trade and carry on business (but not as a partner with her husband) for her separate use and benefit in the same manner as if she were unmarried. And she may make contracts as if sole in respect to such trade, business, or services and her said separate estate, or upon the faith and credit thereof; and upon such contracts she may sue and be sued as if she were unmarried. But whilst the judgment or decree against her upon such transactions is declared to be *personal*, it is also declared that it can be *enforced only against her separate property*. (V. C. 1887, ch. 103, §§ 2287 to 2289.)

The husband's liability upon the wife's contracts during coverture, wherever it exists, must be referred to one or the other of the two heads of *agency* or of *duty*.

W. C.

1. Husband's Liability upon his Wife's Contracts made during Coverture, *upon the Score of Agency*.

The wife may be the agent of the husband just as a stranger may be, and the authority, as in other cases, may be either *express* or *implied*, and, according to the general rule which governs all authorities, may be revoked at the husband's pleasure. (1 Bl. Com. 442, & n. (42); Manby v. Scott, (1 Sid. 109), 2 Smith's L. C. 365.)

If the wife's agency is *express*, its scope and extent will be ascertained by its terms, and the husband's responsibility for any contracts she may make in her representative character, is by no means limited to necessities, but extends to whatever subjects the power embraces, and, in short, is governed by the same rules as in other agencies. (*Ante*, pp. 225 & seq.)

The wife's agency however, is more frequently *im-*

plied than express, the implication being for the most part derived from one or the other of the following considerations, namely:

(1), *From the Usage of the Parties*: When the husband has been accustomed to recognize the contracts and dealings of the wife in the particular in question, as binding upon him. (*Ante*, p. 226, 1^m.)

(2), *From the Custom of the Neighborhood*: Whereby particular transactions are usually managed by the mistress of the family.

(3), *From the Husband's Voluntarily and Knowingly Taking the Benefit of the Contract*: As where he *consciously* suffers his wife to wear or use articles of dress or jewelry purchased by her. (*Ante*, p. 227, 4^m.)

(4), *From the Peculiar Circumstances of the Husband's Family*: As where, by long absence on a distant journey, or by protracted illness, his personal attention to his domestic affairs is rendered impossible. (*Ante*, p. 226, 3^m; 1 Bl. Com. 442, & n. (42); Reeve's Dom. Rel. 79, 80; 1 Pars. Cont. 287; Bac. Abr. Bar. & F. (H.); Smith's Cont. 411 & seq.)

Hence, where in one case the wife had bought a large quantity of jewelry, and in another costly articles of dress, in both instances beyond her husband's station in society and means, without the husband's actual knowledge or authority, and it did not appear that she had ever in his presence worn any of the articles, or that he had ever recognized or allowed any similar transactions by her, he was held not to be liable. (*Montague v. Benedict*, 3 B. & Cr. (10 E. C. L.) 631; *Seaton v. Benedict*, 5 Bingh. (15 E. C. L.) 28; 2 Smith's L. C. 352, 356, 359.)

On the other hand, it does not affect the husband's liability on the score of agency that the wife has been guilty of adultery, although he may have abandoned her in consequence, if he has neither expressly nor impliedly revoked her authority as his agent. Thus, where a party, having detected his wife in an adulterous intercourse, separated himself from her, leaving her, however, with two children bearing his name, still in the occupancy of his house in which they had cohabited, without provision for support, and giving no notice to the neighboring tradesmen not to furnish her with supplies on his credit, he was held liable for such articles. (*Norton v. Fazan*, 1 Bos. & Pul. 226; *Manby v. Scott* (1 Sid. 109), 2 Smith's L. C. 366.)

2^d Husband's Liability upon his Wife's Contracts made during Coverture, *upon the Score of Duty*.

The husband is under a *moral* and *legal* obligation to supply his wife with *necessaries* suited to her station, or

that station which he knowingly *permits her to assume*. Nor is that obligation a gratuitous one. Upon the marriage he becomes at common law absolutely the owner of her chattel-property in possession, and entitled to appropriate her *choses in action*, to dispose at his pleasure of her chattels-real, to take the profits of her free-hold lands during the coverture, and to receive her earnings. And hence, from this definite duty, thus sustained by such very valuable considerations, the law with reason originally *implied a promise* on his part to pay whoever shall supply such necessaries for his wife a reasonable compensation therefor. And although at present in Virginia he derives no such pecuniary advantages from the marriage, yet as the statute of 1877, and the Revisal of 1887 (V. C. 1887, ch. 103, §§ 2284 & seq.), makes no change in the established doctrine, it is supposed to remain unaltered. (*Manby v. Scott*, &c. 2 Smith's L. C. 364-'5; *Hawkes & ux. v. Saunders*, Cowp. 290; Bac. Abr. Bar. & F. (H.).) And this implication, derived, as it is, from his duty, is not terminated by the parties living separately, nor even by a divorce *a mensa*; nor is it capable of being repelled by any, the most peremptory *general* prohibition not to trust her, however it may be as to prohibitions addressed to particular persons. It is not even obviated by the possession on the part of the wife, of an abundant separate estate. She is not obliged to expend it in her support, but has, notwithstanding she may be rich, and he poor, an undoubted legal right to exact from him the charges of her maintenance. (1 Bish. Marr'd Women, § 895; *Meth. Church v. Jaques*, 1 Johns. Ch. (N. Y.) 458; *Jaques v. Meth. Church*, 17 Johns. (N. Y.) 593; *Gunn v. Samuel*, 33 Ala. 201; *Magee v. White*, 23 Texas, 180.) And this obligation of the husband ceases only when his duty to supply the necessaries ceases; that is, it is believed, in the following cases alone, namely:

(1), Where the wife refuses, *without sufficient reason* (*e. g.*, of cruelty, or of outrage upon her feelings, as by his introducing his mistress into his house), to live with him, and abandons his house and society. (*Carr v. Carr*, 22 Grat. 173; *Latham v. Latham*, 30 Grat. 338-'9; 1 Bish. Marr. & Div. § 573.)

(2), Where the wife is guilty of adultery.

(3), Where she is supplied by him, or indeed from any source, with necessaries, or the means of procuring them, whether the existence of such supply be or be not known to the person who furnishes her the articles in question.

In the first two of these cases, the wife having lost sight of her conjugal duty, the husband is exonerated from

any further *marital* obligation to support her; and in the last-named case he has discharged his duty, and can be constrained to do no more; or at least, the duty has been discharged by some other than the complainant. (1 Bl. Com. 442, & n. (42); 2 Smith's L. C. 360 & seq., 364, 366; 2 Kent's Com. 146 & seq.; Bac. Abr. Bar. & F. (H).)

With us (however it may be in England), the wife who is obliged by her husband's cruelty or misconduct to leave his house, may compel him, as we have seen, by direct proceeding in equity for the purpose, to allow her *alimony* (*Ante*, p. 307, 31.), which, however, is not to the prejudice of the husband's obligation to pay a stranger for necessities furnished her meanwhile, before she obtains alimony. (Bac. Abr. Bar. & F. (H.); Hunt v. De Blaquiére, 5 Bingh. (15 E. C. L.) 550.)

The husband's obligation on the score of duty extends to *necessaries only*, proportioned to his estate and degree, or to that station which he knowingly allows her to assume; and what are such necessities is a question for the jury in each case. (Bac. Abr. Bar. & F. (H.); Smith's Cont. 451.) Servants suitable to the husband's fortune and rank have been held to be such—as a lady's maid to the wife of a governor of Barbadoes (White v. Cuyler, 1 Esp. 200; S. C. 6 T. R. 176); and so has house furniture, corresponding in like manner to station and fortune (Hunt v. De Blaquiére, 5 Bingh. (15 E. C. L.) 550.) See Montague v. Benedict, 3 B. & Cr. (10 E. C. L.) 631; Seaton v. Benedict, 5 Bingh. (15 E. C. L.) 28; Lane v. Ironmonger, 5 Bingh. (13 M. & W. 368).

The leading case upon this subject is Manby v. Scott, parts of which are to be found in various books. The argument of Sir Orlando Bridgman, C. J., which is long and amusing, if not satisfactory, is given in Bridgman's Judgments, 229; that of Hale, C. B., in Bac. Abr. Bar. & F. (H.); and that of Hyde, J., in 1 Mod. 124. Siderfin's version of the case is to be found in 2 Smith's L. C. 332; and a shorter report in 1 Lev. 4. The report of Levinz, coupled with that of Siderfin, is said to contain the substance of all the arguments on either side. (2 Smith's L. C. 358.)

The earlier cases on the subject are judiciously classed, and the result stated, in Bolton v. Prentice, 2 Str. 1214, note (1).

3^g. Doctrine Touching the *Husband's Liability for the Wife's Torts*.

The husband is liable, in damages, for all assaults, slanders, libels, and other torts committed by the wife towards strangers, and, therefore, for her *frauds*, as long as the relation continues, notwithstanding the parties have perma-

nently separated. The action, however, is not to be brought against the husband alone for a *tort* committed by his wife, but against the husband and wife jointly. And where the tort complained of is a *fraud*, it must not be a fraud so connected with a *contract* as to be part of the same transaction. No action lies in such a case,—not against husband and wife in conjunction, because if that were allowed, the wife would lose the protection which the law gives her against contracts made by her during coverture; for there is no contract which a married woman would be likely to make, whilst she knew her husband to be alive, which could not be treated as a fraud; nor against the husband alone, for when her conduct is the cause of the action, he is not liable to be sued by himself, but only in conjunction with her. (1 Bl. Com. 443, n. (44); 3 Rob. Pr. (2d ed.) 216-'17; Id. 219-'20; Cooper v. Witham, 1 Lev. 247; Head v. Briscoe & ux. 5 Carr. & P. (24 E. C. L.) 48; Adelphi Loan Assoc. v. Fairhurst, 9 W. H. & Gord. 429; Cannam & ux. v. Farmer, 3 W. H. & H. 698.)

It has been said that husband and wife may not be sued jointly for any tort committed by her in her husband's presence, or with his concurrence, but that in such a case the husband must be sued alone. This, however, seems to be unwarranted by the current of authority. The true doctrine is believed to be that, if the tort be one in which, from its own nature, it is impossible that two should concur in committing it, as *slander*, the husband must be sued alone for his own defamatory words or other wrong, in one action, and must be joined with her in another action for hers. And if the tort be one which, from its nature, a *married woman cannot commit*, the husband alone must be sued. Thus, if husband and wife concur in the act of detaining another's chattels, an action of detinue cannot be maintained against the wife at all, but against the husband only; for, in law, the wife *cannot detain*. And so, it has been said, it is in respect to the action of *trover and conversion*, where it is alleged that the conversion is *to the use of husband and wife*, for it is impossible that the conversion should be *to her use*. (Bac. Abr. Detinue, Bar. & F. (L.); 3 Th. Co. Lit. 312 and 341, n. (Q. 4th); Com. Dig. Bar. & F. (4); Berry & ux. v. Nevys, 4 Cro. (Jac.) 661; Wilbraham v. Snow, 2 Saund. 47 l. & 47 m.) But this has been by some regarded as an excessive refinement. (3 Rob. Pr. (2d ed.) 217-'19; Keyworth v. Hill & ux., 3 B. & Ald. (5 E. C. L.) 685; Catterall v. Kenyon, 3 Ad. & El. N. S. (43 E. C. L.) 315.) And at all events, it is agreed that a joint action of *trespass* is maintainable against husband and wife for *converting* the chattels of another; and, indeed, of *trover* also, if it be laid in the declaration that they were converted

to the use of the husband. (Wilbraham v. Snow, 2 Saund. 47 l, and 47 m.) On the other hand, where the injury is of a character such that two may join in perpetrating it, as if it be assault and battery, enticing away or harboring another's servant, etc., they may be sued jointly for the tortious act of both; and the acquittal of one will not preclude the plaintiff from recovering on account of the wrong done by the other. (1 Bl. Com. 443, n. (44); Bac. Abr. Bar. & F. (L.); Id. Detinue; Swithin & ux. v. Vincent & ux. 2 Wils. 227; Draper v. Fulkes, Yelv. 165, 166 a, n. (1); Fawcett v. Beavres, 2 Lev. 63; Vine v. Saunders & ux., 4 Bingh. (33 E. C. L.) 96; Roadcap & ux. v. Sipe, 6 Grat. 216 & seq.)

Where the husband and wife *must be joined*, the determination of the coverture before a judgment is recovered puts an end to the husband's liability; but if he may be sued alone, the wife's death does not prevent him from being still subjected. (Reeve's Dom. Rel. 71 '2; Anon. 4 Cro. (Car.) 509.)

4^g. Doctrine Touching suits *by and against Husband and Wife.*

This subject has been, to a considerable extent, unfolded in connection with previous topics. It will be expedient, however, to pursue it somewhat more into detail, and in doing so use will be made freely of the admirable analysis to be found in 1 Bl. Com. 443, n. (44). Let us note, (1), Actions by husband and wife; (2), Actions *against* husband and wife; and (3), Suits as *between* husband and wife, or by or against the *wife alone*, in the courts of equity;

W. C.

1^b. Actions *by Husband and Wife.*

Under this head may be considered, (1), Where the *husband and wife must join*; (2), Where the *husband must sue alone*; (3), Where *husband and wife may join or not, at their election*; (4), Where the *wife may sue alone in courts of law*; (5), Who should sue when the *husband or wife is dead*; (6), Consequences of a *mistake made as to the proper parties*;

W. C.

1ⁱ. Where *Husband and Wife must Join.*

Under this head we are to have regard to, (1), Doctrine *as to the ante-nuptial contracts* and causes of action of the wife in her *own right*; (2), Doctrine when the wife is *executrix or administratrix*, and the cause of action accrues to her as such; and (3), Doctrine as to causes of action which affect the wife, accruing *during coverture*;

W. C.

1^k. Doctrine as to the *Ante-nuptial Contracts*, and Causes of Action of the Wife *in her own Right.*

The general rule is that, as to *ante-nuptial* contracts and causes of action, *husband and wife must join*. Hence they must join in all actions upon bonds, notes, and other personal contracts made to and with the wife before marriage, whether the breach of the contract were before or during coverture; and also for rent or any other cause of action accruing *before marriage*, in respect of the *real estate* of the wife. So they must likewise join *for torts* to the person, or to the property (real or personal), of the wife committed before marriage; and also in *real actions* for the recovery of the *wife's lands*; for *waste* committed therein before or after marriage; and in *detinue* for the *charters* of the wife's inheritance; in all which cases the cause of action would survive to her, should she survive her husband or the coverture. (1 Bl. Com. 443, n. (44); Bac. Abr. Bar & F. (K.); Id. Detinue, (B.); 1 Chit. Pl. 32-3; Dejarnette v. Allen & ux. 5 Grat. 511 & seq.) And it may be observed further, that whenever they *sue jointly* (even in cases where the husband has it in his option to *sue alone*), if the husband die, or the coverture is dissolved by divorce, pending the suit, the right *survives to her*; and on her death afterwards, the suit must be revived in *her* name, and not in that of his personal representative. (Archer v. Colby & ux. 4 H. & M. 410; Vaughan & ux. v. Wilson, Id. 452.)

- 2^k. Doctrine when the *Wife is Executrix or Administratrix*, and the Cause of Action accrues to her as such.

In these cases the husband *must*, for the most part, *join* with her (when he has any right to sue at all); for as her interest is merely in *auter droit*, he can have no pretensions to a right of action, save in conjunction with her. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 53.)

- 3^k. Doctrine as to Causes of Action which Affect the Wife, *Accruing During Coverture*.

There is but one instance where a cause of action which affects the wife, and accrues *during the coverture*, *must* be asserted by a *joint suit*, namely, the case of a tort to the *person of the wife*. In cases arising out of *contracts*, or out of torts to the *wife's property*, the husband either must sue alone, or may join his wife or not, at his pleasure. See *infra*, 2ⁱ and 3ⁱ.

When the injury is committed to the *person* of the wife *during coverture*, by battery, slander, etc., if the object be to recover for the *personal suffering or injury* which she has experienced, the husband and wife must *sue jointly*; whilst if it be to recover for the injury done to the *husband*, by the loss of the company and services of the wife, or otherwise, the action should be in *his name*

alone. (1 Bl. Com. 443, n. (44); Newton & ux. v. Hatter, 2 Ld. Raym. 1208; 3 Rob. Pr. (2d ed.) 192.)

2ⁱ. Where the Husband *must Sue Alone.*

The cases under this head to which it is desired to direct the student's attention, are, (1), Cases of contracts, wherein the wife is concerned, made *during the coverture*; (2), Cases of *torts to wife's personal property*, committed *during the coverture*; (3), Cases of *torts to the wife's person*, committed *during the coverture*; (4), Cases of injuries by breach of contract, or by tort to the husband's property or person, *occurring before or during the coverture.*

W. C.

1^k. Doctrine in Cases of Contracts wherein the Wife is Concerned, made *during the Coverture.*

For the wife's work and labor, or for goods sold or money lent by her during the coverture, the common law assigns to her no interest, and raises no promise in her favor. The interest results *to the husband alone*, and in his favor alone a promise is implied; and hence *by him alone* can an action be brought. When, however, the wife is, *by her labor or otherwise, the meritorious cause* of the action, and an *express promise* is made to her, the husband, at his option, may either sue alone, or assenting to give her an interest in the contract, may join her in the action, in which last case, if she survive (either him or the coverture), the cause of action will survive to *her*. (1 Bl. Com. 443, n. (44); Howell v. Maine, 3 Lev. 403; Brashford v. Buckingham, 3 Cro. (Jac.) 77; Buckley v. Collier, 1 Salk. 114; Weller &c. v. Baker, 2 Wils. 424; Bidgood v. Way, 2 W. Bl. 1239; Boggett v. Frier & al. 11 East. 301; May v. Boisseau, 12 Leigh, 520; *Post*, pp. 381, 387.)

And where a debt, due to the wife before marriage, is merged by a *specialty* (*i. e.* a sealed instrument), executed to the husband *alone after coverture*, he alone must sue; and so, if a promise *after coverture* be made *to the husband*, upon any fresh consideration proceeding *from him* (*e. g.* his forbearance to sue), an action on such promise must be by the *husband alone*. (1 Bl. Com. 443, n. (44); Yard v. Eland, 1 Ld. Raym. 368; S. C. 1 Salk. 117; Rumsey v. George, 1 M. & S. 180.)

2^k. Doctrine in Cases of Torts to the *Wife's Personal Property, Committed during Coverture.*

When the cause of action has its inception, as well as its completion, after the marriage, the husband *must sue alone*, because the legal interest in such property is by the marriage vested in him. But when the inception of the wrong occurs before the marriage, and the comple-

tion of it afterwards, the husband may sue alone, having regard to the consummation of the injury, or he may join the wife with him, looking to the inception only. Hence, in a case where goods, which before the marriage had belonged to the wife, were both *taken and converted* during coverture, it was held that the husband *must sue alone*, whatever form of action he might adopt; whereas if the *taking* occurred before the marriage, and the *conversion* afterwards, the wife may in *trover* be joined or not with the husband, at his pleasure, according as he chooses to regard the conversion as occurring when it actually did, after the marriage, or as taking place *by relation*, at the period of the taking. The action of *detinue*, however, being for the *present detainer*, must in all cases be prosecuted by the *husband alone*; whilst trespass, or trespass on the case, for the ante-nuptial wrong of *the taking*, must always be in the *joint names* of husband and wife. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 84-5; Bac. Abr. Detinue (A.); 3 Rob. Pr. (2d ed.) 188; Nelthorp & ux. v. Anderson, 1 Salk. 114, and n. (a); Blackborne & ux. v. Greaves & als. 2 Lev. 107.)

3^k. Doctrine in Cases of Torts to the *Wife's Person*, Committed *during the Coverture*.

We have seen that where the object of the action is to recover for the *personal suffering or injury* done to the wife, the action *must be joint* by husband and wife both; but where the design is to recover for some special damage resulting to *himself* from the tort to the wife; as, for example, by the *loss of her company or services*, or by reason of *expenses* incurred by him, etc., the action must be by *himself alone*. (1 Bl. Com. 343, n. (44); 1 Chit. Pl. 83-4; 3 Rob. Pr. (2d ed.) 192; Russell & ux. v. Corne, 1 Salk. 119, and n. (b); S. C. 2 Ld. Raym. 1031; Lewis & ux. v. Babcock, 18 Johns. (N. Y.) 443; Dengate & ux. v. Gardiner, 4 M. & W. 6.)

But if the husband sues, together with his wife, for a cause of action which involves such *special damage to him*, the joint action may still be maintained, if it be otherwise proper, the additional circumstances mentioned being regarded as only matter of *aggravation*. Thus, where husband and wife brought an action of trespass for the false imprisonment of the wife, whereby the *husband's business remained undone*; or until he paid £10; or for assaulting the wife, whereby the husband was *put to charges for her cure*, etc.—those circumstances were considered as aggravations merely, the gist of the action being the *false imprisonment*, for which a joint action was proper. (Russell & ux. v. Corne, 1 Salk. 119, and n. (b); S. C. 2 Ld. Raym. 1031.)

4^k. Doctrine in Case of Injuries to the *Husband's Person or Property, Before or During Coverture.*

The wife, having no legal interest in the person or property of her husband, cannot join with him in any action for an injury thereto, except only in case of a *malicious prosecution of both*, in which it is held that they *may join*, or the husband may *sue alone*. (1 Bl. Com. 443, n. (44) ; 3 Do. 143 ; 1 Chit. Pl. 83 ; Newton & ux. v. Hatter, 2 Ld. Raym. 1208.)

3ⁱ Where the Husband and Wife *may Join or not, at their Election.*

We are here to consider, (1), The doctrine as to the mode of suing in case of *contracts made during coverture* ; and (2), In case of *torts committed during coverture* ;
W. C.

1^k. Doctrine as to Husband and Wife Joining or not at the Husband's Election, in case of *Contracts made During Coverture.*

When the contract is made *during the coverture, expressly with the wife*, either alone or in conjunction with the husband, she being the *meritorious cause thereof* (as if it were for her labor or services), the husband, at his election may *join his wife* in the action, or may *sue alone*. But if the coverture terminates without the husband having *disaffirmed the wife's interest*, by the appropriation of the cause of action to his sole use, the wife surviving will be entitled to it, and if he survives, he can only recover it as her administrator. (May v. Boisseau, 12 Leigh, 520, per Starnard J., citing a number of cases and especially Philliskirk v. Pluckwell, 2 M. & S. 393 ; Richards v. Richards, 2 B. & Ad. (22 E. C. L.), 447 ; Wills v. Nurse, 1 Ad. & El. (28 E. C. L.) 40.) And so, as to an ante-nuptial contract of the wife, if after marriage the other party gives a bond to husband and wife, or for a new consideration, such as forbearance, etc., make a parol (*i. e.*, an *unsealed*) promise to *them both*, they *may join*, or, at his election, the husband *may sue by himself*. If, however, such subsequent bond or promise were made to the *husband only*, he alone can sue. (1 Bl. Com. 443, n. (44) ; 1 Chit. Pl. 33 '4 ; Howell v. Maine, 3 Lev. 403 ; Weller, &c. v. Dippers at Tunbridge Wells, 2 Wils. 414, 424 ; Aleberry v. Walby, 1 Str. 230 ; Ankerstein v. Clarke & als. 4 T. R. 616 ; Philliskirk v. Pluckwell, 2 M. & S. 395 ; Rumsey v. George, 1 M. & S. 180 ; Yard v. Ellard, 1 Salk, 117 ; S. C. 1 Ld. Raym. 368 ; Lee v. Myne & ux. 3 Cro. (Jac.) 110 ; Cathell v. Goodwin, 1 Harr. & Gill. (Md.), 468 ; Schoonmaker's Ex'ors v. Elmendorf & al. 10 Johns. (N. Y.) 49.)

For *rent*, or other cause of action accruing *during the*

coverture, on a lease or other contract relating to the wife's *real property*, whether made before or during the coverture, the husband and wife may join, or he may sue alone; as, also, in case of their eviction from a lease for years, granted to them jointly. But the interest and participation of the wife must in all these cases *appear from the pleadings*. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 34; Aleberry v. Walby, 1 Str. 230; Dunston & ux. v. Barwell & al. 1 Wils. 224; Bidgood v. Way, &c. 2 Wm. Bl. 1239; Rose v. Bowler, 1 H. Bl. 106.)

And where husband and wife have recovered judgment for money due to the wife *dum sola*, they may join in an action on the judgment, or the husband may sue alone. (1 Bl. Com. 443, n. (44).)

2^k. Doctrine as to Husband and Wife Joining or not, at the Husband's Election, in case of *Torts Committed During the Coverture*.

In respect to torts to the *wife's person*, we have seen that where the complaint relates to the wife's personal suffering or injury, the action *must* be in the joint names of husband and wife; but if the gist of the action is the injury done to the husband, he must sue alone. But it is established that no *joint action* can be maintained for an alleged *joint tort to both*, save in case of a *joint malicious prosecution* of husband and wife, in which case they may both join in respect to the injury of both, or the husband may sue alone. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 83-4.)

As to torts to the *wife's personal property*, we have also seen that where the cause of action had as well its inception as its consummation during the coverture, the husband must sue alone, but that if the inception were before marriage, and the wrong was completed afterwards (as in case of goods taken whilst the wife was *sole*, and *converted* after she became *covert*), the suit may be either *joint*, or in the *husband's name alone*. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 85; Russell & ux. v. Corne, 1 Salk. 119, n. (b); Weller, &c. v. Baker, 2 Wils. 423-4; Bidgood v. Way, 2 Wm. Bl. 1236.)

In respect to trespasses on the wife's lands in the possession of the husband in her right, the husband may at common law sue alone therefor or may join his wife. (1 Chit. Pl. 85; Com. Dig. Bar. & Feme, (W.) and (X); Clapp v. Stoughton, 10 Pick. (Mass.), 469; Allen v. Kingsbury, 16 Pick. 240.)

It should be observed, that the effect of joining the wife in an action when the husband may sue alone, is that, if the husband die whilst the suit is pending, or before the judgment is satisfied, the interest in the subject-

matter will survive to the wife, and not to the personal representative of the husband, although, if he had sued alone, it would have demonstrated his disaffirmance of the wife's interest, and then, upon his death, the cause of action would not have survived to her. (1 Chit. Pl. 35; *Coppin v. —*, 2 P. Wms. 497; *Day v. Pargrave*, cited *Philliskirk v. Pluckwell*, 2 M. & S. 396, n. (b); *Bidgood v. Way*, 2 W. Bl. 1239.)

4. When the Wife *may Sue alone in a Court of Law.*

A married woman having in law no separate legal existence, cannot, in general, at common law, while the relation of marriage subsists, sue without joining her husband, whether for causes of action arising before the coverture, or during its continuance, notwithstanding he may have deserted her; or, although she lives apart from him, and has a separate maintenance; nor even though she be divorced *a mensa*, etc., with an allowance of alimony, unless of alimony, unless in the last case there has been super-added to the sentence of divorce a decree of *perpetual separation*, which, it will be remembered, operates upon the personal rights and legal capacities of the parties as a decree of divorce from the *bond of matrimony*, except as to marrying again. (*Ante*, p 300, 2; V. C. 1873, ch. 105, § 13; V. C. 1887, ch. 101, § 2264.) Nor is she estopped from pleading her coverture, although she has declared herself to be a *feme-sole*, and as such executed deeds, maintained actions, and gained credit. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 31; 1 Th. Co. Lit. 133-'4; Bac. Abr. Bar. & F. (M.); *Hatchett v. Baddeley*, 2 W. Bl. 1081; *Lean v. Schutz*, Id. 1199; *Marshall v. Rutton*, 8 T. R. 545; *Nurse v. Craig*, 2 Bos. & Pul. (N. R.) 148; *Hyde v. Price*, 3 Ves. Jr. 443; *McNamara v. Fisher*, 3 Esp. 19; *Lewis v. Lee*, 3 B. & Cr. (10 E. C. L.) 291; *Bogget v. Frier & al.* 11 East, 301; *Davenport v. Nelson*, 4 Campb. 26; *Hookham v. Chambers*, 3 Br. & B. (7 E. C. L.) 92.)

The exceptions to this principle are few and well defined, being limited to those cases where the wife, notwithstanding her coverture, is allowed to *bind herself* by her contracts, which occurs, as we have seen (*Ante*, p. 367), in the cases following, viz:

(1), Where the wife is a *sole trader* by the *custom of London*, which is not law with us.

But while *sole trading* by a married woman is not with us admissible by *custom*, it is permitted by the special provisions of the Married Woman's Law, so that the separate trading be not carried on as a *partner with her husband*. (V. C. 1887, ch. 103, § 2287.)

(2), Where the husband is *civiliter mortuus*, by reason of abjuration of the realm, or of banishment or transpor-

tation, as long as the husband is abroad, in respect to which it may well be doubted whether in Virginia a *civil death* is legally possible. (2 Bl. Com. 443, n. (44); 1 Th. Co. Lit. 134 & seq. & n's (P.), (Q.) and (R.); Branch v. Bowman, 2 Leigh, 170; Platner v. Sherwood, 6 Johns. C. R. (N. Y.) 118; V. C. 1873, ch. 206, §§ 6 & seq.; V. C. 1887, ch. 202, §§ 4115 & seq.)

(3), Where the husband is *abroad* and an *alien enemy*. (Deerly v. Duchess of Mazarine, 1 Salk. 116 & n. (a); S. C. 1 Ld. Raym. 147.)

(4), Where the husband *is an alien*, and has *never been in Virginia*. According to some authorities, the wife may bind herself by contract, and may sue alone wherever the husband is abroad *and is an alien*, although not an alien enemy, and although he has been here and professes an intention to return in a short time. (Walford v. Duchesse de Pienne, 2 Esp. 554; Franks v. Same, Id. 588.) But these cases seem to have been overruled by later decisions, and the doctrine established as above stated, viz.: that the husband, being abroad, must be either an *alien enemy*, or must never have been in this country. (Kay v. Duchesse de Pienne, 3 Campb. 123; Marshall v. Rutton, 8 T. R. 345; Gregory v. Paul, 15 Mass. 31.)

(5), Where in Virginia there has been a decree of *perpetual separation*, superadded to a sentence of divorce *a mensa*, &c. (V. C. 1873, ch. 105, § 13; V. C. 1887, ch. 101, § 2264; *Supra*, p. 383.)

In reference to the first four of these exceptions, see 1 Bl. Com. 443, n. (44); 1 Chit. Pl. 31-2; Bac. Abr. Bar. & F. (M.); 1 Th. Co. Lit. 133-4 & seq., & n's (P.) and (Q.); Hatchett v. Baddeley, 2 W. Bl. 1081; Lean v. Schutz, Id. 1199; Kay v. Duchesse de Pienne, 3 Camp. 123; Bogget v. Frier & al. 11 East. 301; Carrol v. Blencore, 4 Esp. 27.

5^d. Who should Sue when the *Husband or Wife is Dead*;
w. c.

1^k. Who should Sue *when the Husband Survives*.

When the husband survives, he may sue at common law by virtue of his *marital right*, for anything to which he became *absolutely entitled, as husband, during the coverture*, and for chattels given, or otherwise accruing to the wife, in her own right, during coverture; but not for such as accrued to her in *auter droit*, as executrix, etc. So he may sue in trespass, for injury to the wife's land during coverture. But he cannot sue for arrears of rent accruing due *after the wife's death* on a lease of her *freehold* lands, made by her before marriage, or by her and her husband, according to the statute. (V. C.

1873, ch. 117, §§ 4, 7; V. C. 1887, ch. 111, § 2502), afterwards. (1 Bl. Com. 443, n. 44; 2 Do. 434-5; Bac. Abr. Bar. & F. (D.); 1 Chit. Pl. 35; 3 Th. Co. Lit. 305 & seq., n's (L.) and (M.); Id. 308; Ankerstein v. Clarke, 4 T. R. 616; Aleberry v. Walby, 1 Str. 230; Beaver v. Lane, 2 Mod. 217; Hill v. Saunders, 2 Bingham 9 E. C. L. 112.)

Thus, the husband may sue for all *chattels real* of the wife (which belong to him by survivorship), for *arrears of rent* accrued during the coverture, or since its termination, in case of leases of the wife's terms for years, made by the *husband alone*, during the coverture; or if made by the wife jointly with him, where the rent is reserved *to the husband*, for such sub-demise, and reservation of rent, is regarded as a disposition *pro tanto* of the wife's original term, and the rent is the absolute property of the husband; and for *arrears of rent*, accrued *during coverture*, upon a lease of the wife's freehold lands, made by her before marriage, or by him afterwards. (1 Lom. Ex. 518-19; 3 Th. Co. Lit. 259; Parry v. Hindle, 2 Taunt. 181.)

And if the wife recover a judgment whilst *sole*, and after marriage the husband and wife sue out a *scire facias*, and have judgment and award of execution thereon, but before execution executed the wife die, the surviving husband is entitled to an action of debt, or a new *scire facias* thereupon, because the award of judgment and execution on the *scire facias* alters the property, and vests it in the husband. So, if, pending an action by husband and wife, the wife die, the suit abates; but if they *obtain judgment*, he may, notwithstanding her subsequent death, issue an execution, or support an action of debt on such judgment. (1 Bl. Com. 443, n. (44); Woodyer v. Gresham, 1 Salk. 116; Gabriel Miles' Case, 1 Mod. 179; O'Brien v. Rowe, 3 Mod. 189; Beamond v. Long, 4 Cro. (Car.) 208; Howell v. Maine, 3 Lev. 403; Anon. Com. 31.) There are some imposing authorities, however, (but generally *dicta* only,) tending to show that the mere recovery of a judgment, or decree, by the husband and wife jointly, does not vest the property in the husband, but that it remains still, as before, subject to survive to the wife in case she survives, and if the husband survives, he must proceed to recover it as the wife's administrator. (3 Hargr. Co. Lit. 351 a, n. 304; Oglander v. Barton, 1 Vern. 396, & notes; Bond v. Simmons, 3 Atk. 21; Garforth v. Bradley, 2 Ves. Sr. 677. See Gregory v. Marks, 1 Rand. 355, 368, 392.)

But for the *choses in action* of the wife, including all

contracts made with her before marriage, and all bonds and notes payable to her, or to her and him, made *during coverture*, on which he has not elected to sue in his own name (thereby disaffirming any interest in the wife), the husband surviving can only maintain an action *as her administrator*, which, in the absence of any agreement to the contrary, he is always entitled to be, and also, after payment of her *ante-nuptial* debts, to be her *sole distributee*. (1 Bl. Com. 443, n. (44); Toll. Ex'ors, 85, 116; *Philliskirk v. Pluckwell*, 2 M. & S. 396, n. (b); *May v. Boisseau*, 12 Leigh, 520, per Stanard J., citing a number of cases, especially the case first referred to, 2 M. & S. 393; *Richards v. Richards*, 2 B. & Ad. (22 E. C. L.) 447; *Wills v. Nurse*, 1 Ad. & El. (28 E. C. L.) 40; V. C. 1873, ch. 126, § 4; *Id.* ch. 119, § 10, (cl. 3); V. C. 1887, ch. 119, § 2639; *Id.* ch. 113, § 2557, (cl. 2, 3); *Templeman v. Fauntleroy*, 3 Rand. 434; *Wade v. Boxley*, 5 Leigh, 442; *Thornton v. Winston*, 4 Leigh, 158, 162.)

It should be observed that, in England, by Statute 32 Hen. VIII., c. 37, § 3, it is provided that "Husbands seised in right of their wives, in fee-tail or for life, of any rents or fee-farms, may distrain, after the death of their wives, for arrears due in their life time," which was interpreted (in conjunction with another provision of the same statute), to allow the husband surviving to recover, either *by action or distress*, all arrears of rents on the wife's ante-nuptial leases of her *freehold* lands, whether accruing *before or during* the coverture. That statute, however, although long a part of our Code, was pretermitted at the Revisal of 1849, so that the common law is supposed to be restored, whereby the husband can recover *only* the arrears accruing *during coverture*. (3 Th. Co. Lit. 255, & n. (D.); *Id.* 259; 1 Lom. Ex. 519.)

2*. Who should Sue *when the Wife Survives*.

The doctrine at common law in this case is, that the surviving wife may sue in respect of all *chattels real* which her husband had in her right, and did not dispose of during coverture. So also she may sue for arrears of rent which became due *before the coverture*, upon any ante-nuptial lease by her of her lands, whether freehold or leasehold; for arrears of rent which became due *during coverture*, for her leasehold (and perhaps her *freehold*) lands, where the rent is reserved to the *husband and wife* (the rent being due in respect to her *joint interest*, which by the reservation is acknowledged as continuing); for arrears of rent falling due *after the coverture ended*, upon ante-nuptial leases of her lands, whether freehold or leasehold; or upon leases of her leaseholds made during marriage, when she, after the husband's

death, elects to *confirm them*; for all *choses in action* to which she was entitled *at the time of the marriage*, and which the husband did not reduce into possession; for all *choses in action* to which she became entitled *during the coverture*, and which her husband did not reduce into possession; for *all torts* committed on her person or property before marriage, or on her person during marriage, for which no redress was obtained by her husband; and, lastly, for all rights of action accruing to her in *auter droit*, as executrix, etc., even against the husband's personal representative, her right of action being at common law only suspended during coverture. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 36; 1 Bright's H. & Wife, 43 & seq.; 1 Lom. Ex'ors, 518-19; Parry v. Hindle, 2 Taunt. 181; Philliskirk v. Pluckwell, 2 M. & S. 396, & n. (b); Howell v. Maine, 3 Lev. 403.)

The correct rule as to the survivorship of *choses in action* to the surviving wife, in case of contracts made with her during the coverture, is said to be this: Whenever the action is on an *express contract with the wife*, or with the *husband and wife*, the *wife may be joined*, unless the consideration averred in the pleadings, or shown in the proof at the trial, be one in which the wife cannot be intended to have an interest; and in every such case, if the interest of the wife *be not disaffirmed by the husband*, by the appropriation of the cause of action to his sole use, by suing in his own name, the wife surviving *will be entitled* to it. (May v. Boisseau, 12 Leigh, 520; Philliskirk & ux. v. Pluckwell, 2 M. & S. 393; Richards v. Richards, 2 B. & Ad. (22 E. C. L.) 447; Wills v. Nurse, 1 Ad. & El. (28 E. C. L.) 40. See *Ante*, p. 379.)

61. *Consequences of Making a Mistake in the Proper Parties Plaintiff.*

Where a married woman ought to have joined her husband with her, but *sues alone*; or where she marries after the suit is commenced, and before plea, the *defendant* can take the objection that she is a *feme covert*, only by *plea in abatement*, and not by *plea in bar*, although the *husband* may sustain a *writ of error*. But when a *feme covert* improperly *sues alone*, having *no legal right of action whatever*, she will fail at the trial. And if she be improperly joined with her husband in an action, when he ought to sue alone, the defendant, if the objection appears on the face of the declaration, may demur, move in arrest of judgment, or reverse the judgment upon a writ of error; or if the objection does not appear on the face of the pleadings, the plaintiff will still be defeated at the trial, upon proving the facts. If, on the other hand, the

husband sue alone, when the wife ought to be joined, either in her own right, or in *auter droit*, as executrix, etc., he will fail at the trial; or if the objection appear on the record, it will be fatal on demurrer, in arrest of judgment, or on writ of error. (1 Chit. Pl. 36-7, 86; Yard v. Ellard, 1 Salk. 119; S. C. 1 Ld. Raym. 368; Bidgood v. Way, 2 W. Bl. 1239.)

2^h. Actions *Against Husband and Wife*.

The analysis of this branch of the enquiry will be the same as under the first head. Thus, it is proposed to consider, (1), Cases where *husband and wife must be joined*; (2), Cases where *husband must be sued alone*; (3), Cases where the husband and wife *may be jointly sued or not*, at the election of the plaintiff; (4), Cases where *the wife may be sued alone* in courts of law; (5), Who is to be sued *in case of death of the husband or wife*; and (6), Consequences of a mistake in the proper parties defendant;
W. C.

1ⁱ. Cases where *Husband and Wife must be Joined*.

In general, a married woman cannot be sued in a court of law without her husband. They must, for the most part, be *sued jointly* for all causes of action, whether of contract or of tort, subsisting against the wife *at the time of the marriage*; also for all torts committed by her *during the coverture*; and for all causes of action against the wife as *executrix or administratrix*, arising out of a personal contract of her decedent. Hence, when a *feme sole* enters into *any contract* (e. g., a bond, promissory note, or other agreement), or commits *any tort* (such as assault, slander, etc.), and then marries, suit during the coverture must be brought against the husband and herself jointly; although where the husband, in respect of some *new consideration*, as forbearance, etc., expressly promises to perform the wife's *ante-nuptial* contracts he may be sued alone on such an undertaking, or he and his wife may be sued jointly on the original demand. Hence, also, if the wife commits torts during the coverture, as by slander, libel, assault, etc., she and her husband must be joined in the action, as also for any forfeiture under a penal statute. It should be observed, however, that although both must be sued for *her tort*, it is not allowable to sue both as for a tort *committed by both*, unless it is really capable of being so committed. Thus, slander by *husband and wife* is impossible. *He* must be sued separately for the slander of which *he* is guilty, and both must be sued for *her's*. But they may be united in an assault and battery, or even of enticing away and harboring the servant of another, and, therefore, for those injuries a joint action lies against both. To this general

doctrine, however, are these qualifications, namely: That the action of *detinue* cannot be supported but against the husband alone as long as the coverture lasts; and that for a *conversion* of chattels, alleged to be made by the husband and wife, the action of *trover* should in strictness be brought *against him only*, or at least that the conversion should not be alleged to have been *to their use*, but to the *husband's use only*, although the objection is cured by the verdict. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 66; Bac. Abr. Bar. & F. (L.); Draper v. Fulkes, Yelv. 165, & n. (1); Wilbraham v. Snow, 2 Saund. 47 l. & m.; Fawcet v. Beavres & ux. 2 Lev. 63; Marshall v. Rutton, 8 T. R. 545; Roadcap & ux. v. Sipe, 6 Grat. 213.)

By the Married Woman's Law in Virginia, the husband is not responsible for the ante-nuptial contracts of the wife, and for them she must sue and be sued separately and apart from her husband, and as we have seen, although it is declared that the judgment or decree shall be *personal*, yet it is also expressly provided that it shall be enforceable only against her separate property. (V. C. 1887, ch. 103, §§ 2288, 2289.)

2ⁱ. Cases where *Husband must be Sued Alone*.

The husband must in all cases be sued alone where the wife cannot be considered as, *in person or in property, giving rise to the cause of action*. Hence the wife is never to be joined with the husband in an action upon a personal contract made by her during coverture, as upon a promise to pay money, or to do any other thing alleged to be made jointly with him, because *her promise, as to herself, is void*. If, in fact, the promise was *joint*, yet he alone is bound by it, and he only is to be sued; and if made by her alone, it is never binding on her; so that if it be of any avail at all, it is in consequence of her being the *agent of her husband*, or of some one else. But although it is improper to join her with her husband for the reason just stated, and although at common law to do so exposes the plaintiff to fail, by reason of the variance between the contract alleged and that proved, yet by statute in Virginia the mistake is effectually cured, wherever there might have been a recovery against the husband, had he been sued separately; that is, whilst the wife is discharged, the verdict and judgment go against the husband, as if he alone had been sued. (V. C. 1873, ch. 173, § 19; V. C. 1887, ch. 166, § 3395; Steptoe v. Read, 19 Grat. 10; Moffett v. Bickle, 21 Grat. 285, &c.; Bash v. Campbell, 26 Grat. 421; Muse v. Farmer's Bank, 27 Grat. 254.) Neither can husband and wife be sued jointly *for any joint tort*, unless it be one which they may unite in committing. Thus they cannot be sued

jointly for *slander by both*, for slander cannot be jointly committed; but for the slander *by him* he must be sued alone, as we have seen; whilst for her's they have to be joined. (Bac. Abr. Bar. & F. (L.); Swithin & ux. v. Vincent & ux. 2 Wils. 227.) There are, however, two cases where, at the first glance, the wife appears to give rise to the cause of action, and where yet she must not be joined; because the injury sought to be redressed is *in law*, done by the husband alone. These cases are the action of *detinue* for a chattel which, after the marriage, is withheld *by husband and wife*; and the action of *trover* for the alleged conversion of the chattel *by them both*, the detainer and conversion being, *in law*, the detainer and conversion *by him alone*. But if they were joined, the objection, at least in the case of *trover*, would be cured, it seems, by verdict. (1 Bl. Com. 443, n. (44); Bac. Abr. Detinue; Id. Bar. & F. (L.); Berry & ux. v. Nevis, 3 Cro. (Jac.) 661; Marshall v. Rutton, 8 T. R. 545; Wilbraham v. Snow, 2 Saund. 471, &c.; Draper v. Fulkes, Yelv. 166 a. and n. (1); Keyworth v. Hill & ux. v. 3 B. & Ald. (5 E. C. L.) 685, & note; Roadcap & ux. v. Sipe, 6 Grat. 213; Williamson v. Paxton, 18 Grat. 489.)

- 3¹ Cases where the Husband and Wife *may be Jointly Sued*, or the Husband Sued Alone, *at the Election of Plaintiff*.

Although husband and wife *must be joined*, as we have seen, in an action on the wife's contract made before marriage, yet if the husband, upon a *new consideration*, such as forbearance, &c., expressly undertake to pay the debt, or perform the contract of the wife, he may be *sued alone* on such undertaking, or (except where the original promise is merged in that of the husband) husband and the wife *may be joined*. (Mitchinson v. Hewson, 7 T. R. 348; Drue v. Thorn, Alleyn, 36.) And when rent becomes due, or any liability arises *during coverture*, out of the lease made to the wife *whilst sole*, the action may be *against both*, by reason of the original contract; or it may be against the *husband alone* by reason of his being the occupant of the premises and a *quasi assignee*. (Lake v. Smith, 1 Bos. & Pul. (N. R.) 177.) So also, where the lease is made during coverture to the *husband and wife jointly*, an action for rent or other liability arising out of the lease may be against the *husband alone*, because directly the promise and obligation are his; or against the *husband and wife jointly*, because *prima facie* the lease is beneficial to her, and is obligatory upon her unless her husband, immediately upon becoming aware of it, shall disclaim it in her behalf, or she, upon becoming *discoverd*, shall disclaim it for herself. (Bac. Abr. Bar. & F. (L).) We have seen that in those cases

where, in point of fact, husband and wife can concur *in committing a tort* (e. g., an assault and battery, or enticing away another's servant, etc.,) they may be sued *jointly* for such wrong; but the husband may also in such case be *sued alone*; and if they are sued together the acquittal of the husband for his alleged participation will not preclude the plaintiff from recovering for the act of the wife. (1 Bl. Com. 443, n. (44); *Fawcett v. Beayres & ux.* 2 Lev. 63; *Keyworth v. Hill & ux.* 3 B. & Ald. (5 E. C. L.) 685.)

4ⁱ. Cases where the *Wife may be Sued Alone in the Courts of Law.*

The wife may be sued *alone*, without her husband, under circumstances corresponding to those which warrant her in *suing without him*; for which see *Ante*, p. 366, 1ⁱ.

And the student must keep in mind that by the Married Woman's Law the wife must sue and be sued in the same manner *as if she were unmarried*, upon all contracts made by her in respect to her separate trade, business, labor or services, or her separate estate, and as to all matters affecting said separate trade, etc., or separate estate, and upon contracts or liabilities made or incurred before her marriage; and there are the same remedies, in respect thereof, for and against her and her said estate, as if she were unmarried, but to be enforced only against her separate estate. (V. C. 1887, ch. 103, §§ 2288, 2289.)

5ⁱ. Against whom Suit is to be Instituted *in case of the Death of the Husband or the Wife, Respectively*; w. c.

1^k. Who is to be Sued *where the Husband Survives.*

The husband, surviving the wife, may be sued for arrears of rent, accruing *during the coverture*, upon a lease made to the wife whilst *sole*, because he either did enjoy, or might have enjoyed, the premises. And so, also, he may be sued for money due upon a judgment recovered against husband and wife during coverture. But he is not liable to be sued in the character of *husband merely*, for any contract or for any tort of the wife made or done *before coverture*, where no judgment has been obtained against them *jointly during coverture*; and if such joint suit be instituted, but she die before judgment, the suit must abate. However, although in such cases he is not liable *as husband*, he may yet be so as his *wife's administrator*. If there be any *choses in action* of the wife, not reduced into possession during coverture, he can recover them, as we have seen, not by virtue of any direct marital right, but only in the capacity of her administrator; and, having recovered them in that character, he must pay, as far as such assets extend, all lawful claims against his wife, including whatever may be due upon her ante-nuptial promises and contracts, and also

by reason of such of her ante-nuptial torts (namely, against property) as by law (V. C. 1873, ch. 126 §§ 20, 21; Id. ch. 145, §§ 7 & seq.; V. C. 1887, ch. 119, §§ 2655, 2656; Id. ch. 137, §§ 2902 & seq.) survive against a personal representative. As to torts committed *by the wife* while the coverture lasts, it seems the surviving husband continues to be liable therefor. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 66, 106; Head v. Stamford, Cas. Temp. Talbot, 174; S. C. 3 P. Wms. 411; Reeve's Dom. Rel. 72; Rigley v. Lee & ux. 3 Cro. (Jac.) 356; Anon. 4 Cro. (Car.) 509; Middleton v. Croft, Temp. Hardwicke, 399.)

2^k. Who is to be Sued *when the Wife Survives.*

Where the wife survives the husband, or outlives the coverture (in consequence of a divorce *a vinculo*), she may be sued upon all her unsatisfied ante-nuptial *contracts*, and also for her ante-nuptial *torts*, and torts committed *by her* during coverture, for which satisfaction has not been previously obtained. But the certificate in bankruptcy of the husband will discharge *her* from all debts and other claims against *her* which could have been *proved against him* in bankruptcy. (1 Bl. Com. 443, n. (44); 1 Chit. Pl. 67-'8, 106; Mitchinson v. Hewson, 7 T. R. 350; Woodman v. Chapman, 1 Campb. 189; James' Bankrupt Law, 87.)

6ⁱ. Consequences of a Mistake in the Proper Parties Defendant.

Where the husband is *sued alone* upon the contract or tort of his wife *before coverture*, and the objection appears on the *face of the declaration*, the defendant may demur, move in arrest of judgment, or have a writ of error to reverse the judgment in an appellate court. If the cause of action be *misdescribed* as being that of the husband, the plaintiff will fail at the trial upon the general issue, upon the ground of a *variance* between the cause of action stated in the declaration and that proved.

If husband and wife be improperly joined on contracts after marriage, or for torts of which they could not, in law, be *jointly guilty*, as for slander *by both*, and the objection appears on the face of the declaration, the defendant may demur, move in arrest of judgment, or have a writ of error. If the objection does not appear in the pleadings, the plaintiff will fail at the trial, at common law, it is said (at least in case of *contracts*), upon the general issue, on the ground of a *variance*. But in Virginia it is provided by statute, that in an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defen-

dants, against whom he would have been entitled to recover if he had *sued them only* (V. C. 1873, ch. 173, § 19; V. C. 1887, ch. 166, § 3395), and consequently it seems that the plaintiff would be entitled to recover against the husband, though he should fail against the wife. (*Stephoe v. Read*, 19 Grat. 10; *Moffett v. Bickle*, 21 Grat. 285, &c.)

And where the wife is sued alone upon her ante-nuptial contract, or for her tort, committed either before marriage or after it, she must plead her coverture *in abatement*, and cannot otherwise avail herself of it, although the husband, it seems, may avoid the judgment by writ of error, *coram vobis*. (Bac. Abr. Bar. & F. (L.); *Id.* Errors & Abatem't; *Milner v. Milner*, 3 T. R. 631.) And if she marry pending an action against her, it does not abate, but the plaintiff may proceed to execution without noticing the husband. But if a *feme covert* be sued upon her supposed contract, *made during coverture*, such contract being wholly void, she may plead the coverture *in bar*, or may give it in evidence, under the general issue of *nil debet, non assumpsit*, or if it be by deed, of *non est factum*. (1 Chit. Pl. 168, 106; *Dyer*, 19a, and *note*; *Yates v. Boen*, 2 Stra. 1104, and n. (1); *King & ux. v. Jones*, 2 Stra. 811; *Swithin v. Vincent & ux.* 2 Wils. 227; *Milner v. Milner*, 3 T. R. 627; *Mitchinson v. Hewson*, 7 T. R. 348.)

3^d. Suits as between *Husband and Wife*, or *by or against the Wife alone*, in the Courts of Equity.

In the civil or Roman law, the husband and wife are considered, not as one, but as two distinct persons, and may have separate estates, contracts, debts, interests, and injuries. Hence, in those courts in England which have adopted, to a great extent, the modes of proceeding of the civil law, and therewith many of its rules and analogies, a married woman may not only, in some cases, sue and be sued without her husband, but, when justice so requires, may *sue him* and *be sued by him*. So it is in the mother-country, in the ecclesiastical courts and courts of chancery, and so with us it is in the courts of chancery. (1 Bl. Com. 444, and n. (47); *Id.* 20, 83; *Ante*, p. 42.)

Courts of chancery recognize in general the rule of law which considers husband and wife as one person, and their interests as the same; and in equity, therefore, as at law, where a suit respects her rights, it is to be, for the most part, instituted *by or against them jointly*; but in equity this doctrine is kept in subordination to the requirements of justice and of social convenience. Thus, if a married woman claims some right in opposition to her husband, such as alimony, in consequence of his cruelty, or the specific enforcement of marriage articles, as he is the party to be complained of, the complaint, of course, can-

not be made in his name; for the husband and wife to join in preferring a demand against the husband would savor of absurdity. In such case, therefore, as the wife, being under the disability of coverture, cannot, without anomaly and some practical inconvenience, sue alone, and yet cannot sue under the protection of her husband, she must seek temporarily some other aid, and the bill in equity is allowed to be exhibited in her name (of course with her consent) by or under the protection of her *next friend* (or *prochein ami*), who is to be named in the bill. (1 Bl. Com. 444, n. (47); Mitf. Eq. Pl. 27-'8; Fonbl. Eq. 95, n. (k); 2 Stor. Eq. §§ 1367, 1368; Griffith v. Hood, 2 Ves. Sr. 452; Watkyns v. Watkyns, 2 Atk. 96; Sidney v. Sidney, 3 P. Wms. 269; Blount v. Winter, 3 P. Wms. 276, note (2); Lampert v. Lampert, 1 Ves. Jr. 21; Arundell v. Phipps & als. 10 Ves. 144, 149; Seagrave v. Seagrave, 13 Ves. 442.)

In like manner a married woman may, upon occasion, defend a suit in equity separately from her husband, and by leave of court she may do so without the protection of another. Thus, if she claims in opposition to him, or if she live separate from him, or disapproves the defence he wishes her to make, she may obtain an order giving her leave to defend separately; although, in general, her separate answer, without a previous order, is to be suppressed as irregularly filed. And yet when the husband, being plaintiff in a suit, makes his wife a defendant, and treats her as a *feme sole*, she may answer separately without an order. So, where a married woman obstinately refuses to join in defence with her husband, she may be compelled to make a separate defence, and for that purpose process may be ordered to issue against her separately. (Mitf. Eq. Pl. 95-'6; 1 Bl. Com. 444, n. (47); Moore v. Moore, 1 Atk. 272.)

But still it seems that a wife cannot sue or be sued in equity *by a stranger*, without her husband being plaintiff or defendant, even in respect to her separate property, except in those cases where she may be sued separately *at law*; or except where the husband is not within the jurisdiction of the court, and she is called on to make good engagements which she has entered into touching such separate property. And in the latter case the most the court can do is to call forth her separate property in the hands of her trustees, and to direct the application of it; for no personal decree is admissible in such case, against a *feme covert*, for the payment of a debt. (1 Bl. Com. 444, n. (47); Fonbl. Eq. 105, n. (p); 2 Stor. Eq. § 1368; Th. Co. Lit. 134 & seq., 136-'7, n s (P.), (Q.) and (R.); Marshall v. Rutton, 8 T. R. 545; Norton v. Turvil, 2 P. Wms. 144;

Dubois v. Hole & ux., 2 Vern. 613 & n. (1); Hulme v. Tenant (1 Bro. C. C. 16), 1 Wh. & Tud. L. C. 355.)

5*. Doctrine Touching Liability of Married Women to Punishment for Crime: w. c.

1^h. Wife's Responsibility for Crimes Committed in the Husband's Presence.

In general the wife is not punishable for crimes committed in the husband's presence, because she is supposed to act *under his coercion*. But to this doctrine there are two classes of exceptions, namely:

(1), The crimes of *treason, felonious homicide, and robbery*; because of the heinousness of the offence, and the necessity of protecting society to the utmost against their commission; and

(2), The offence of *keeping a brothel*; because, says Blackstone, it touches the domestic economy or government of the house in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. (4 Bl. Com. 29; 1 Do. 444; 1 Hale P. C. 44 '5, 47; 1 Russ. Cr. 16, 17; Whart. Cr. L. §§ 71 & seq., 78.)

A disposition, however, has been manifested to recede from this doctrine in its original latitude, it being held by several high authorities that although, with the foregoing exceptions, there is a presumption of the husband's coercion in respect to any crime which is committed by the wife *in his presence*, yet it is only a *prima facie* presumption, and may in any case be repelled by showing that she acted from her own free and uncontrolled will. (1 Bl. Com. 444, & n. (48); 4 Do. 28-9; Bac. Abr. Bar. & F. (G.); 1 Russ. Cr. 15, 16, 18; 1 Hale's P. C. 516; Synops. Crim. Law, 11, 12; Uhl's Case, 6 Grat. 706; Whart. Cr. L. §§ 71 & seq.)

Nor is it to be supposed that because the wife is not liable in general to be punished for crimes committed in her husband's presence, that the husband is in such cases amenable to punishment. He can be punished only when he appears to have instigated the act, or to have participated in it.

2^h. Wife's Responsibility for Crimes Committed by her *not in her Husband's Presence*.

For offences committed by the wife *not in the husband's presence*, whether they be felonies or misdemeanors, she is no less amenable to punishment than if she were unmarried, save only that if the offence be *punishable by fine*, the husband must, at common law, be joined with her in the prosecution, because upon conviction *he must pay the fine*. Whether under the "Married Woman's Law" he must be joined in such a case, is more than doubtful. It would seem that, as by that law she retains all her property un-

der her exclusive control (V. C. 1887, ch. 103, §§ 2284–2286), he need not be joined, not being liable for the fine. But whatever corporal punishment is inflicted *she must suffer alone*. (4 Bl. Com. 29; 1 Russ. Cr. 17; Bac. Abr. Bar. & F. (G.); Reeve's Dom. Rel. 73; Rex v. Crofts, 2 Str. 1121; Hasbrouck v. Weaver, Johns. (N. Y.) 247; Com'th v. Senior, 1 Mete. (Mass.) 151; Ruther v. The State, 1 Port. (Ala.) 132.) The Married Woman's Law, however, whilst it confers important business privileges on *femes covert*, does not seem in any wise to affect their own criminal responsibility. (1 Whart. Cr. Law, § 78 a; Com'th v. Gannon, 97 Mass. 547; Com'th v. Welsh, Id. 593.)

3^h. Wife as *Accessory to Husband's Crime*.

The wife may be *accessory before the fact* to the crime of her husband, by persuading or advising him to commit it. But she cannot be *accessory after the fact* by receiving him, the law in that instance recognizing her domestic allegiance and the impulses of conjugal affection to be paramount to her social duty. (1 Russ. Cr. 16, 19; 1 Hale, P. C. 516, 47; Bac. Abr. Bar. & F. (G.).) And this principle is now with us confirmed by statute, not only as between husband and wife, but also in respect of other near relations by blood or marriage. (V. C. 1873, ch. 195, § 8; V. C. 1887, ch 190, § 3886.)

4^h. Wife's Committing Offences *Against Husband's Property*.

A wife cannot be guilty *of any offence* against the property of her husband; for husband and wife are *one person* in law, and at marriage he endowed her with such an interest in his property as that she can commit no offence against it. Even a stranger who takes the husband's goods with the wife's privity, is not guilty of larceny, unless he were her *paramour*. (1 Russ. Cr. 19; Bac. Abr. Bar. & F. (G.).)

6^g. Doctrine Touching Husband and Wife *being Witnesses, the One for or against the Other*.

In no cause, civil or criminal, are husband and wife allowed to give evidence for or against each other; and that not so much because it is impossible their testimony should be fair and impartial, nor because of the union of person and interest subsisting between them, as because of considerations of public policy lying at the basis of society. For it is essential to domestic happiness that the confidence which ought to be maintained between husband and wife should be sedulously cherished, and as far as possible be preserved unimpaired. Hence, neither consort is competent to testify to what was derived through the medium of the confidence which the conjugal relation inspires, even after such relation is *terminated* by death; and hence, also,

whilst of late the restraints which wisely forbade, in tenderness to human frailty, that one should be a witness for or against himself, have been in criminal as well as in civil cases almost wholly withdrawn, the incapacity of husband and wife to testify for or against each other remains unchanged; nor can any *consent*, founded as the rule is on public policy, authorize the breach of it. (1 Bl. Com. 443, 444, n. (46); 1 Greenleaf's Evid. §§ 334, 337; 2 Kent's Com. 178-9; V. C. 1873, ch. 172, § 22; V. C. 1887, ch. 164, § 3346.)

But where the offence is directly against the person of the wife (or doubtless of either consort), this rule has been usually dispensed with. If the husband commits, or is accessory to the commission, of any crime of violence against the wife, or, as is supposed, the wife against the husband, the injured consort is not prohibited to testify against the aggressor, in order to obtain the protection of the law by surety of the peace, or to procure punishment to be inflicted. Thus, a woman is a competent witness against a man indicted for forcibly abducting and marrying her, if the force were continuing until the marriage,—of which fact she is also a competent witness; and this, according to the better opinion, notwithstanding her subsequent assent and voluntary cohabitation; for otherwise the offender would profit by his own wrong. So, also, the wife is a competent witness against her husband on an indictment for a rape committed by his procurement upon her person, as in Lord Audley's (or Castlehaven's) case: or for an assault and battery, or other violence, committed upon her. And her dying declarations, in case of her homicide, are admitted against him like those of a stranger. (1 Bl. Com. 443-4, n. (46); 1 Greenl. Evid. §§ 343, 346; 1 East. P. C. 357.)

It can scarcely be needful to observe that this rule does not operate to exclude declarations and admissions made by the wife *as agent* of the husband. These, when made in the progress of the transaction, are admissible as the declarations and admissions of any other agent, partly by virtue of the authority conferred by the agency, and partly because such statements are part of the *res gesta*; that is, of the transaction itself. (1 Bl. Com. 444, n. (46); 2 Kent's Com. 179-80; 1 Greenl. Evid. § 185.)

3^d. Contrast of the Sexes, in *Respect to their several Rights and Privileges.*

Blackstone concludes his dissertation upon the law of husband and wife by remarking that even the *disabilities* imposed on the wife are, for the most part, intended for her protection and benefit. "So great a favorite," he complacently observes, "is the female sex of the laws of England!" (1 Bl. Com. 445.)

This sentiment of the learned and too eulogistic commentator gives occasion to an indignant protest by Mr. Christian, who, in a note to the passage in question, has given a brief, but admirable summary of the principal differences in the English law respecting the two sexes. (1 Bl. Com. 445.)

W. C.

1^a. Differences in *Respect of Crimes*.

Let us note, (1), The differences of the homicide of the husband by the wife, and of the wife by the husband; and (2), The difference in respect to the allowance of the benefit of clergy to the two sexes respectively;

W. C.

1^b. Difference in Respect of *Homicide of Husband by Wife, and of Wife by Husband*.

Husband and wife, in the language of the law are styled *baron and feme*, which word *baron* (or lord), says Mr. Christian, "ascribes to the husband not a very courteous superiority. This, however, might be deemed merely an unmeaning *technical* phrase" (albeit the phrase and its application are taken from the *Scriptures*,—2 Pet. iii. 5, 6), "if we did not recollect that, at common law, if the *baron* kills his *feme*, it is the same as if he had killed any other person; but if the *feme* kills her *baron*, it is denominated a species of treason (*petit treason*), and the law condemns her to the same punishment as if she had killed the king. And for every species of treason (though in *petit treason* the punishment of men was only to be drawn on a hurdle to the place of execution and *hanged*), till 30 Geo. III., c. 48 (A. D. 1790), the sentence of women was to be drawn and *burnt alive*. (1 Bl. Com. 445, n. (49); 4 Do. 204, & n. (44).)

This distinction in Virginia is done away with, it being declared by statute that there shall be no "distinction between murder and *petit treason*; but the last mentioned offence shall be punished as murder." (V. C. 1873, ch. 195, § 4; V. C. 1887, ch. 190, § 3882.) And not only are all cruel and unusual punishments prohibited by our constitution (Va. Const. Art. I., § 11), but the death penalty is by statute required to be inflicted always *by hanging*. (V. C. 1873, ch. 203, § 9; V. C. 1887, ch. 198, § 4062.)

2^b. Difference in Respect to the Allowance of the *Benefit of Clergy* to the two Sexes, respectively.

The *benefit of clergy* had its origin in the pious regard paid by Christian princes to the primitive church. It was an exemption from punishment, even for heinous crimes, allowed by civil governments, to persons in holy orders, out of an exaggerated reverence for the professed ministers of God, which the clergy, when increased in numbers,

wealth and power, claimed as an inherent right *jura divinia*, and in some countries had their claim allowed, although never in England, to the extent of total exemption. Originally, no one was admitted to the privilege of clergy unless he was actually a priest in orders; but in that period of universal ignorance, the ability to read was a mark of such learning as it was supposed could belong only to a clergyman, and was received as sufficient evidence of the clerical character, entitling the individual who possessed the power to exemption from punishment, in the civil courts, for the *less heinous capital crimes*. Many changes were made in the doctrine from time to time by statute, all tending, under cover of the *benefit of clergy*, to mitigate the severity of the penal code by substituting for the death penalty, in the lower capital felonies, such as manslaughter, bigamy, larceny, etc., in the case of persons not previously convicted of like offences, the milder punishment of burning in the hand, imprisonment, transportation, &c. This leniency was not at first extended to persons who, by no presumption, could be supposed to possess a clerical character, and therefore it was not enjoyed *by women*. But in process of time, the benefit of clergy was allowed without regard to the clerical profession of the culprit, and by Statute 3 & 4 W. & M. c. 9, and 4 & 5 W. & M. (A. D., 1692, 1694), *without regard to sex*; and finally, 7 & 8 Geo. IV., c. 28 (A. D. 1828), it was abolished. But by the common law, and for many ages, the distinction of sex was so much regarded, that all women were denied the benefit of clergy; and until the Statutes of 3 & 4 W. & M. and 4 & 5 W. & M., above named, they received sentence of death, and might have been executed, for the first offence, in the clergyable crimes of simple larceny, bigamy, manslaughter, etc., however learned they were, because their sex precluded the possibility of their taking holy orders; though a man *who could read* was for the same crime subjected only to burning in the hand, etc.; and if *a peer*, to no other penalty but the disgrace of conviction. (1 Bl. Com. 445, n. (49); 4 Do. 365 & seq.; 4 Steph. Com. 121.)

In Virginia the earliest colonial statute upon the subject was in 1732 (4 Hen. Stats. 325-6), whereby the distinction of sex was abolished and the faculty of *reading* dispensed with. On the establishment of the penitentiary system in 1796, and the consequent restriction of capital punishment in regard to *free persons* to a few of the more atrocious felonies—the less heinous crimes of that grade being punished by confinement in the penitentiary for various terms, graduated to the guilt and mischievousness of the offence,—there was no longer occasion, as to free persons, for the device of *benefit of*

clergy, which, as to them, was accordingly abolished. In the case of *slaves*, however, to whose situation penitentiary punishment was supposed to be not adapted, the benefit of clergy was retained for half a century longer, having been finally abolished by act of 1847-'8. Our present statutes provide (V. C. 1873, ch. 195, § 4; V. C. 1887, ch. 190, § 3882), that "there shall be *no plea of benefit of clergy*." See 1 R. C. (1819) ch. 171, § 10; Acts 1847-'8, p. 124, ch. 120.

2^g. Differences Between the Sexes *in Respect to Civil Rights*.

We are here to observe (1), The disposition of intestate property, as between the sexes; (2), The rights of husband and wife, respectively, in each other's chattels; (3), The rights of husband and wife, respectively, in each other's lands; (4), The liability of the sexes, respectively, to taxation without representation; (5), The protection afforded by law to the chastity of women; and (6), The protection afforded by law to female reputation;

W. C.

1^h. The Disposition of Intestate Property *as Between the Sexes*.

Intestate *personal* property in England is equally divided between males and females; but a son, though younger than any of his sisters, is *sole heir* to the whole of the realty. (1 Bl. Com. 445, n. (49).)

In Virginia, both classes of property as to which a decedent is intestate, pass without discrimination to, and are equally divided amongst, males and females, save only that, in the ascending line, the father is preferred to the mother, etc., the grandfather to the grandmother, etc. (V. C. 1873, ch. 119, §§ 1, 10; V. C. 1887, ch. 113, §§ 2548, 2557.)

2^h. The Rights of *Husband and Wife*, Respectively, *in each other's Chattels*.

A woman's personal property, at common law, becomes by marriage, or may become in consequence of the reduction of it into possession *during coverture*, absolutely the husband's, and at his death he may leave it entirely away from her; but in England (by the statute of Distributions, 22, 23 Car. II., ch. 10, § 586), if he die without will, she is entitled to *one-third* of his personal property if he has children, otherwise to *one-half*. (1 Bl. Com. 445, n. (49).)

In Virginia, until April 4, 1877, the doctrine was the same as to the husband's title to the wife's chattels, as above described. As to the wife's interest in the husband's personalty, however, our law was considerably more favorable to her than that of England. If the husband died intestate, leaving a widow, and issue *by her*, the widow was entitled to one-third of the surplus of his personalty,

remaining after payment of debts and expenses of administration. If there were *no issue by her*, she was entitled absolutely to such of the personalty acquired by the husband, in virtue of his marriage with her, as should remain *in kind* (that is, unchanged in form) at his death, after payment of his debts and the expenses of his administration (so far only as the other personal estate of the husband might be insufficient for the satisfaction thereof); she was and is still also entitled, if the husband left issue by a former marriage, to *one-third*; if no such issue, to *one-half* of such surplus. And of this distributive share of his personalty, the widow could not and cannot now be deprived without her consent, by her *husband's will*, although she may be by an *irrevocable* disposition made in his lifetime, even if not to take effect until after his death, and although designed to defeat her claim as distributee. (V. C. 1873, ch. 119, §§ 10, 12; V. C. 1887, ch. 113, §§ 2557, 2559; Lightfoot's Ex'or v. Colgin, 5 Munf. 42; Gentry v. Bailey, 8 Grat. 594; *Ante*, 324 & seq., 338 & seq.) But by the statute of April 4, 1877 (V. C. 1887, ch. 103), the husband, in Virginia, is deprived of all interest whatsoever in his wife's chattels or other property, except as tenant by the curtesy, and as distributee, as to marriages thereafter contracted, or as to property thereafter acquired. (Acts 1876-7, p. 333, ch. 329; V. C. 1887, ch. 103, § 2293; *Ante*, p. 338.)

3^d. The Rights of *Husband and Wife, Respectively, in each other's Lands.*

By the marriage the husband, at common law, becomes absolutely master of the profits of the wife's *freehold lands* during the coverture; and if he has by her a living child born during the coverture, and he survives the wife, he retains during his life the whole of the lands belonging to her, of which she was seised at any time during the coverture, of an estate of inheritance, such that the issue of the marriage may *inherit it as heir to the wife*; an interest which is denominated his estate *by the curtesy*. But in a corresponding estate of inheritance of the husband, the wife, if she survives, is entitled for her life only to *one-third* (her *dower*); but this whether there was any child of the marriage or not. (1 Bl. Com. 445, n. (49); 2 Min. Insts. 103, 117, 157.)

The doctrine in Virginia is the same, except that the husband has no interest whatsoever in the wife's lands by the Married Woman's Law, save as tenant by the curtesy. (V. C. 1887, ch. 103, §§ 2284 to 2286), and except also that a widow is by statute with us entitled to *dower* (as even at common law the husband might have had *curtesy*) in *equitable* as well as in *legal* estates of inheritance, and

even in *rights of entry or of action*. (V. C. 1873, ch. 106, §§ 1, 2; Id. c. 112 § 17; V. C. 1887, ch. 102 §§ 2267, 2268; Id. ch. 107, § 2429; 2 Min. Insts. 117, 121-2, &c.; *Ante*, pp. 335 & seq.; 343 & seq.)

4^h. The Liability of the Sexes Respectively, to *Taxation without Representation*.

The property of women is taxed without representation, that is, without the privilege of voting for representatives who impose the taxes. (1 Bl. Com. 445, n. (49).)

The same proposition holds good in Virginia, and it would be very detrimental to the public weal were it otherwise. The power to influence the suffrage of others is even more valuable than the possession of the right of suffrage one's self; and that silent and pervasive influence which, in Anglo-Saxon communities, is now wielded by woman with prodigious effect, going far to mould, whilst it moderates, the opinions and actions of society upon all questions of enduring significance, is a mightier agency than the sex would possess in the ballot. Women cannot be injured by any legislation, but especially not by taxation, without inflicting a corresponding wrong on their fathers, husbands, brothers and sons, whose votes will afford their interests all the protection they need; so that there seems no adequate reason for unsexing them, filling their breasts with the fires of contending factions, in which they are prone to indulge, when they enter into them at all, with more rancorous and unreflecting violence than men, and thus vexing society with unceasing bitterness and strife, from which not even the sacred precincts of home would be free. Woman's sphere of duty and happiness is far removed from such contentions, in which she could not engage without disastrous results to her proper influence and character. It must be remembered also that, as mingling in the contests of the hustings would be peculiarly repugnant to women of education and refinement, the function of voting would devolve chiefly upon the classes least fitted to exercise it with discretion, and most likely to abuse its opportunities. If *men* of culture retire from the strife of a canvass with disgust, unpatriotically leaving the highest interests of the body politic to be controlled too largely by the designing, the corrupt, and the ignorant, the wives, sisters and daughters of these delicate citizens could hardly be expected to lay aside the instincts of their sex, as well as the sentiments and tastes engendered by their social relations, and soil their woman's robes of purity with the mire of election contests.

5^h. The Protection Afforded by Law to the *Chastity of Women*.

The chastity of women is by the law sedulously guarded

against violence, but it may be thought that a less adequate protection is afforded against the arts of the seducer. Thus, a parent can have no reparation in damages from the betrayer of his daughter's virtue, but by alleging that she is his *servant*, and that by the consequences of the seduction he is put to charge and expense, or is deprived of the benefit of her services, or where the seducer is at the same time a trespasser upon the premises of the parent. This principle is needful in order to prevent an indefinite and very inconvenient multiplicity of actions; for otherwise every relation of the female, whether near or remote, might fairly claim to have suffered more or less injury from the wrong inflicted, and might assert an independent right to redress. It is true, however, that when, by such forced circumstances, the law is enabled to take cognizance of the wrong, at the suit of the parent, juries are allowed to disregard the pretended injury, and to give damages commensurate, as far as damages can be commensurate, to the wound inflicted on the parent's feelings and the dishonor attendant upon the injury. (1 Bl. Com. 445, n. (49); *Edmundson v. Mitchell*, 2 T. R. 4, 5; *Irwin v. Dearman*, 11 East. 23; *Andrews v. Askey*, 8 Carr. & P. (34 E. C. L.) 7; *Sedgw. Dam.* 512, &c.)

The doctrine in Virginia, in respect to the *civil redress*, is the same, except that it is provided by statute that "an action for seduction may be maintained without any allegation or proof of the *loss of the services* of the female by reason of the defendant's wrongful act" (V. C. 1873, ch. 145, § 1; V. C. 1887, ch. 137, § 2896), which, it will be observed, dispenses with the averment and proof of *acts of service*, but not of the *relation of master and servant*. (*Lee v. Hodges*, 13 Grat. 726; *White v. Campbell*, Id. 573; *Clem v. Holmes*, 33 Grat. 724 & seq.) But a much more material change in the *criminal aspect* of the subject is wrought by a yet more recent statute, whereby it is declared that to seduce and have illicit connection with any unmarried female of previous chaste character, *under promise of marriage*, shall be a *felony*, punished by confinement in the penitentiary from *two to ten years*. (V. C. 1873, ch. 187, § 16; V. C. 1887, ch. 180, § 3677.)

6^b. The Protection afforded by *Law* to Female Reputation.

Mr. Christian complains vehemently that in England female virtue, by the *temporal* law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in *conversacion*, that the purest maid or the chastest matron is the most meretricious and incontinent of women, with impunity, or free from the animadversions of the temporal courts. Thus, female honor, which is dearer to the sex than their lives, is left by the common

law to be the sport of an abandoned calumniator. (1 Bl. Com. 445, n. (49); 3 Do. 125.)

This is certainly a very highly colored representation of the defect of the common law in the particular in question. It is true that words imputing to a woman a want of chastity are not, by that law, actionable *per se*; that is, without alleging and proving special injury therefrom; but unless special injury were proved, even though the words were actionable *per se*, the damages would be, in general, merely nominal. The disadvantage, therefore, of the words not being actionable *per se*, is less than at first sight would be supposed, and far less than is suggested by Mr. Christian's rhetorical statement. However, in Virginia the embarrassment, such as it is, is removed by a statute which declares that all words which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, shall be actionable, and no demurrer shall preclude a jury from passing thereon. (V. C. 1873, ch. 145, § 2; V. C. 1887, ch. 137, § 3897; Brooks v. Calloway, 12 Leigh, 466; Moseley v. Moss, 6 Grat. 534; Bourland v. Eidson, 8 Grat. 27; Hogan v. Wilmoth, 16 Grat. 82 & seq.)

CHAPTER XVI.

OF PARENT AND CHILD.

3^d. Relation of Parent and Child.

The next and most universal relation in society is that between *parent and child*.

Children are of two sorts: (1), *Legitimate*; and (2), Spurious, or *bastards*, each of which will be considered in its order, and first of legitimate children. (1 Bl. Com. 446; 2 Steph. Com. 314; Reeve's Dom. Rel. 270 & seq.; Bac. Abr. Bastardy);

W. C.

1^o. Legitimate Children.

It is proposed to state, (1), The definition of a legitimate child; (2), The duties of parents to legitimate children; (3), The powers of parents in respect to legitimate children; and (4), The duties of children to parents;

W. C.

1¹. Definition of a *Legitimate Child*.

A legitimate child is defined at *common law* to be one that is born in *lawful wedlock*, or within a competent time after its termination, where there is no *impossibility* of

procreation by the husband. (1 Bl. Com. 446; 2 Steph. Com. 314; Reeve's Dom. Rel. 270; Bac. Abr. Bastardy, (A. c.)

Pater est quem nuptiæ demonstrant is the rule of the civil or Roman law; and this holds with the civilians, whether the nuptials happen before or after the birth of the child. In England the rule is narrowed, for the nuptials must *precede* the birth; of which more will be said in treating of bastards. (1 Bl. Com. 446.)

In Virginia such changes have been wrought by statute as materially to modify the definition. Having regard to those changes, we may define a legitimate child to be one *born in wedlock*, whether *lawful or not* (where procreation by the husband is not *impossible*), or within a competent time after the coverture is determined; or if born out of wedlock, where the parents afterwards intermarry, and the father *recognizes the child*, either before or after the marriage. (V. C. 1873, ch. 119, §§ 6, 7; V. C. 1887, ch. 113, §§ 2553, 2554; Ash v. Way's Adm'r, 2 Grat. 203; Stones v. Keeling, 5 Call, 143; Watkins & ux. v. Carlton, 10 Leigh 560.)

2^d. The Duties of Parents to Legitimate Children.

The duties of parents to their legitimate children range themselves under the heads following, namely: (1), Their maintenance; (2), Their protection; and (3), Their education;

W. C.

1st. The Duty of Maintenance of Legitimate Children.

The wants and weakness of childhood render maintenance by some one other than the child himself indispensable, and the voice of nature indicates the parent, that is, the father, as the fittest person to afford it. The duty of maintenance on the part of fathers in respect to their *infant* children is, therefore, a principle of *natural law*, the right to which, on the part of such children, is insisted upon as a *perfect right* by the most eminent authorities, as, amongst others, by Puffendorf and Montesquieu. The latter very justly observes that the ordinance of marriage in civilized states is built, in part, on this natural obligation of the father to provide for his children; for marriage ascertains and makes known the person who is bound to fulfil the duty; whereas, in promiscuous and illicit conjunctions the father is unknown, and the mother, besides being generally wanting in ability, finds a thousand obstacles in her way—shame, remorse, the constraint of her sex, and the rigor of social laws—that stifle her inclinations. (1 Bl. Com. 447; Puffend. Nat. Law, B. IV., c. xi., § 4; Montesq. Sp. Laws, B. XXIII., c. 2; 2 Kent's Com. 189; Reeve's Dom. Rel. 283.)

The municipal laws of all well regulated societies take

care to enforce this duty; though Providence has done it more effectually by implanting in the heart of every parent that unquenchable affection which not even the deformity of person and mind, nor the wickedness, ingratitude, and rebellion of children can totally extinguish. (1 Bl. Com. 447.)

The civil or Roman law *obliges* the parent to provide maintenance for his offspring. Nay, it does not suffer him at his death to disinherit his child without expressly giving his reasons for so doing; and fourteen reasons are reckoned up which may justify such disinherison. If the parent alleges no reason, or a bad or false one, the child may set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent. And it is remarkable under what color the children are to move for relief in such cases, namely, by suggesting that the parent had lost the *use of his reason* when he made the *inofficious* testament. And this, as Puffendorf observes, is not to bring into dispute the testator's power of disinheriting his own offspring for sufficient reasons, but to examine the motives upon which he did it; and if they are found defective in reason, then to set the testament aside. But this may well be considered as going too far. Every man ought to have, by the laws of society, power to dispose of his own property; and, as Grotius very well distinguishes, *natural right* obliges a parent to give a *necessary* maintenance to children, at least during the period of infancy; but what is more than that, they can claim only by the favor of their parents, or the positive constitutions of the municipal law. (1 Bl. Com. 447-'8; Puffend. Nat. Law, B. IV., c. xi. § 7; Grot. de Jur. Bel. &c. B. II., c. 7, § 3.)

Let us next see what provision our own law has made for enforcing this natural duty. In England the limits of the obligation, and the manner of coercing its performance, are prescribed by sundry statutes, as 43 Eliz. c. 2, and others; and as these have not been enacted in Virginia, it has been gravely questioned by high authority (1 Tuck. Com. (B. I), 126), whether with us, governed as we are in this particular by the common law alone, there is any *perfect* legal obligation upon a parent to afford necessary maintenance to his *infant children*. In England the common law courts, after some fluctuations, seem to have settled down upon the doctrine that a parent is not obliged, independently of statute, to pay for necessities furnished an infant child, and that it is only by virtue of an actual or implied authority from him that he can be charged with anything, even necessities, supplied to such child. (1 Pars. Cont. 247 & seq., and notes; Mortimore v.

Wright, 6 M. & W. 482; Shelton v. Springett, 11 Com. B. (73 E. C. L.) 452.)

Looking at the question, however, in the light of common sense, it would seem that, as common law is common reason, and enforces in general all *definite* precepts of natural duty, as this is; as the father is entitled to *all the earnings* of his infant child; as provision has generally been made by statute (V. C. 1873, ch. 121, § 5) to compel a putative father to support his *bastard children*, and also to pay the expenses of his infant child in the State lunatic asylums (V. C. 1873, ch. 82, § 53; V. C. 1887, ch. 75, § 1707), and as it has always been held in equity that a father, if of ability, is bound to maintain his minor children, even though they may have property of their own, the conclusion should be clearly in favor of the common law obligation of the *father* to support his infant offspring; and so, according to Mr. Parsons (1 Pars. Cont. 251 & seq.), is the tenor of American authority, but certainly with an imposing array of dissent. See Edwards v. Davis, 16 Johns. (N. Y.) 284; *In re* Ryder, 11 Pai. (N. Y.) 187; Van Valkenburg v. Watson, 13 Johns. 480; Benson v. Remington, 2 Mass. 113; Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 Mass. 97.

Whether a mother, who is not fully within these reasons, is bound (if there be no father) to maintain her children whilst they are under age is more than doubtful; the weight of authority, both in England and the United States, being against her liability. (1 Pars. Cont. 256 and n. (c); 2 Kent's Com. 191; Fawkner v. Watts, 1 Atk. 408; Myers v. Wade, 6 Rand. 448, 451; Cunningham v. Cunningham, 4 Grat. 45.)

In Virginia the doctrine is believed to be established, that the common law holds the *father*, at least, legally bound to supply *necessaries* to his infant child: and that he may therefore be charged with the contracts of such child for necessaries (as a husband may be on the contracts of his wife) on the score of *duty*, as well as on the score of *agency*. On the score of *duty*, he is liable only for *strict necessities* (not without reference, however, to the father's fortune and condition in society, or the condition which he has allowed his child to assume); and, moreover, for such necessities as have not been supplied by the parent, or from any other source. And the father cannot impair this liability, arising out of his duty, by any general notice or prohibition, although perhaps he may thereby preclude transactions with particular persons. But the liability ceases where the duty ceases, or is performed. On the score of *agency*, the liability may extend, of course, as far as the authority, whether express or implied, extends; and

is capable of being terminated, as we have seen (*Note*, p. 245, 5^e) other agencies are, by revocation, &c. (1 Bl. Com. 447; 2 Kent's Com. 191; 1 Pars. Cont. 253 & seq. and notes; Von Valkinburg v. Watson, 13 Johns. (N. Y.) 480; Easley v. Craddock, 4 Rand. 423; Myers v. Wade, 6 Rand. 448; Evans v. Pearce, 15 Grat. 515; Penn v. Whitehead, 17 Grat. 503; Griffith v. Bird & als. 22 Grat. 80; Hughes v. Hughes, 1 Bro. C. C. 387 and note; Andrews v. Partington, 3 Bro. C. C. 60; Munday v. Howe, 4 Bro. C. C. 223; Hoste v. Pratt, 3 Ves. Jr. 733; Maberly v. Turton, 14 Ves. 499; Greenwell v. Greenwell, 5 Ves. 197 and notes.)

In England they have two statutes designed to relieve the parish of the support of impotent persons who have near relatives able to take care of them, namely, the statutes of 43 Eliz. c. 2, and 5 Geo. 1, c. 8, &c. They require not only the *father and mother*, but also the *grandfather* and *grandmother*, of the impotent poor to maintain them; but only in respect to such as are *unable to work*, through infancy, age, disease, or accident, and then to provide necessities only. The common law imposes no obligation save on the *father* (possibly on the mother also) to afford support to his children, and applies to no children but those *under twenty-one years of age*. Hence, a man is not bound to support his infant son's wife or children, nor the infant children of his own wife by a previous marriage, at least not under the principle in question; but if the daughter-in-law, or step-children, live in his family, and are treated as a part thereof, he may be liable, on the ground of *agency*, for supplies procured for them, as for the rest of his family, by his wife, unless he gives notice to the contrary. An idea at one time prevailed (which receives Blackstone's sanction), that as the wife, before her second marriage, if of sufficient ability, was charged with the support of her children, the obligation, after the marriage, like her other debts, devolves on her husband; but later resolutions have ascertained this to be a fallacious analogy, the wife herself being discharged by her second marriage from *any future liability*, even supposing (what is believed to be not true) that any liability attaches to her at any time. (1 Bl. Com. 449; Rex v. Dempson, 2 Stra. 955; Rex v. Munday, 1 Stra. 190; Cooper v. Martin, 4 East. 82; Tabb v. Harrison, 4 T. R. 118; Billingsley v. Crickett, 1 Bro. C. C. 68.)

As germane to the present topic, it is expedient to enquire into the doctrines which prevail touching the maintenance of an infant out of his own fortune, if he has one. The principle, as already indicated, is, that if the father be of sufficient ability, he must himself maintain the infant

child, without having any allowance therefor out of the child's estate. But if the father be himself unable to support and educate the child in a manner corresponding to the fortune he is to enjoy, a court of equity will decree such a sum to to be contributed periodically, from the infant's estate, as will suffice to accomplish the object in view. But otherwise, the infant's property will be allowed to accumulate for his own benefit, unless, indeed, a legacy were left him *expressly* for maintenance. And where the father is not of ability, maintenance will be decreed for the time past, as as well as to come, but without interest on the arrears. (*Jackson v. Jackson*, 1 Atk. 515; *Fawkner v. Watts*, Id. 408; *Butler v. Butler*, 3 Atk. 60; *Jeffreys v. Jeffreys*, 3 Atk. 123; *Darley v. Darley*, 3 Atk. 399; *Hughes v. Hughes*, 1 Bro. C. C. 387, & n. (1); *Andrews v. Partington*, 3 Bro. C. C. 60, & n's (1) and (a); *Munday v. Howe*, 4 Bro. C. C. 223; *Hoste v. Pratt*, 3 Ves. 733; *Simon v. Shaw*, 9 Ves. 285, 288; *Collis v. Blackburn*, Id. 470; *Maberly v. Turton*, 14 Ves. 499, 500, 501, &c.; *Mellish v. Mellish*, 14 Ves. 516; *Evans v. Pearce* & als. 15 Grat. 515; *Griffith & al. v. Bird* & als. 22 Grat. 80.)

Our law has made no provision, like the Roman law, to hinder a parent from disinheriting his children by will. It leaves every man's property at his own disposal (save what is reserved for a surviving wife), wisely conceiving that the interests of society are thereby, upon the whole, best subserved, honest industry, enterprise and thrift promoted, and the obedience and subordination of children retained. Heirs and children, however, are favorites of the courts of justice, and cannot be disinherited by any dubious or ambiguous words, there being required the utmost certainty of the testator's intention to take away the right of an heir; or, as it has been otherwise expressed, plain words of gift, or necessary implication, are required in order to disinherit an heir at law. Hence, a man's heirs, or next of kin, are not deprived of what the law gives them merely by his testamentary declaration, however formal, that they *shall not have it*, if he does not give his estate to some one else. For, besides the favor extended to the heir, if it were not so, as the *law* appoints no one else but the next of kin to take the property, and as the decedent has given it to no one else, there would be that *absence of ownership*, which is always deprecated and sought to be avoided. (1 Bl. Com. 450; *Hobart v. Suffolk*, 2 Vern. 644; *Crabtree v. Bramble*, 2 Atk. 689; *Parsons v. Freeman*, 3 Atk. 747; *Habergham v. Vincent*, 2 Ves. Jr. 225; *Berry v. Usher*, 11 Ves. 92, and n. (2); *Dyer v. Dyer*, 19 Ves. 614; *Boisseau v. Aldridge*, 5 Leigh, 222.)

It exemplifies this favorable concern for children that

the English courts have always held that a will of lands, executed with all the formalities of law, was revoked *by implication* (although the statute which prescribed the formalities for wills, 29 Car. II., c. 3, was silent on the subject), if the testator afterwards *married and had issue*; and in Virginia we have by statute carried this doctrine further still, by declaring in terms that the will shall be revoked wholly or partially, according to circumstances, by the marriage alone, or by the subsequent birth of issue alone, supposing such issue to be merely pretermitted, and not provided for or disinherited. If the testator *had no child at the date of the will*, and issue is afterwards born, the will, except so far as it provides for the payment of the testator's debts, is to be construed as if the devise or legacy had been expressly limited to take effect only in case the issue should die under age, unmarried, and without issue. And if *at the date of the will*, the testator *had a child living*, and a child be born afterwards, who is neither provided for nor expressly excluded, but only pretermitted, such after-born child, or any descendant of his, is to succeed to such portion of the decedent's estate as he would have been entitled to if the testator had died intestate, towards raising which portion the legatees and devisees are to contribute ratably. But if such after-born child, or descendant, die under the age of twenty-one years, unmarried and without issue, his portion of the estate, or so much as remains unexpended in his support and education, shall revert to the person to whom it was given by the will. (V. C. 1873. ch. 118, §§ 17, 18; V. C. 1887, ch. 112, §§ 2527, 2528.)

2^g. The Duty of *Protection of Legitimate Children*.

From the duty of *maintenance*, we may easily pass to that of *protection*, which is also a duty imposed on parents by the law of nature, but by the municipal law of all well-ordered societies is rather *permitted* than *enjoined*; nature in this respect working so strongly as to need rather a check than a spur. A parent may uphold his child in a law suit without incurring the guilt of *maintenance*. He may also justify an assault and battery in defence of his child; and the law extends as much indulgence to the rage of a parent for an injury inflicted on his child, as if it had been done to himself. Thus, where a man's son is beaten by another boy, and the father went near a mile to find him, and then revenged his son's wrong by beating the other boy, of which beating he afterwards unfortunately died, it was held to be not murder, but manslaughter merely. Such indulgence does the law extend to the workings of parental affection and the frailty of human nature. Where, however, the act of the parent does not follow close

upon the provocation, and whilst he is in the *delirium* of passion occasioned thereby; when a reasonable cooling-time has elapsed, or the passion has actually cooled, the homicide is held to be *murder*. The precise time to be allowed for parental anger, provoked by injury to a child, to subside, is not, and cannot be exactly determined. It is certain, however, that *twenty-four hours is more than sufficient*; and whatever be the space, violence committed afterwards is to be referred, not to passion, but to *malice*, and the *fell spirit of revenge*, for which the law has *no toleration*, how great soever the injury which may provoke it. (1 Bl. Com. 450; Crim. Synops. 46, 48 '9; McWhirt's Case, 3 Grat, 595.)

3^g. The Duty of *Education of Legitimate Children*.

The last duty of parents to their children is that of giving them an education suitable to their station in life, a duty pointed out by reason, and scarcely inferior in importance to that of maintenance itself. For, as Puffendorf well observes (Law of Nat., B. VI., c. 2, § 12), it is not easy to imagine or allow that a parent confers any considerable benefit upon his child by bringing him into the world if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others and shameful to himself. It is, however, a duty too undefined to be easily enforced against parents by the municipal law (as that of maintenance may be), and the *common law* does not attempt it. Hence, if a stranger, unsolicited, pays for the education of an infant child, he cannot constrain the father to indemnify him unless he specially promised so to do. That the common law is wise in forbearing to enforce upon parents the acknowledged moral duty of educating their children appears not only from the *vagueness* of the obligation, but also from the ascertained fact that the parents of *nearly one-half* of those of an age to be educated, even in prosperous communities, are for the most part disabled by poverty from effecting it at their own expense. See 1 Bl. Com. 450 '51; 2 Kent's Com. 195; Kay's Report, Rigg's National Education.

If, then, the *general education* of the people is, or ought to be, an object to be desired, it must be attained otherwise than through the private agency of parents themselves. It can be accomplished only by the interposition and aid of government in some form or other. Education is undoubtedly a very great boon to the person who obtains it, and, indirectly, it is an important advantage to those connected with him. But it is not in the aspect of an individual benefit that it may be legitimately bestowed at the public expense. *Charity* constitutes no part of the

functions of government. The common treasure is not to be employed save for objects which concern the whole community. That individuals are peculiarly and directly benefited by a policy which confers benefits upon the whole, is not an argument in favor of the policy; but, on the other hand, it is no argument against it. In order, therefore, to justify the application of public money to educational purposes, it must be proved that the education conferred is for the *public advantage*, and that it is beyond the reach of private effort.

That *the whole* of every community is deeply interested in the education—moral, mental, and physical—of *every person* within its limits, will seem to many, probably to most, little less than an axiom. But as in the ardor of debate it is sometimes questioned, it may not be amiss to bring together in brief the prominent considerations which are supposed to establish the proposition. And although the views to be presented constitute an essential part of the argument in favor of a system of public instruction, it is not to be understood that they contemplate the undervaluing, or lessening in any manner, of the moral obligation of parents themselves to see to the education of their children. The influence and teachings of *home* are inestimable, especially in those most vital particulars of religion and morality; and the most successful and pervasive system of free schools will leave still ample scope for them all, with the added advantage of greater effectiveness from the government supplying that positive instruction which nearly one-half of the parents in every society are incompetent to afford. To proceed to the considerations:

(1), *General education tends to preserve the peace and order of society.*

It is admitted that ignorance and vice are not *invariable concomitants*, any more than knowledge and virtue, and that to train the head only, without a proportionate culture of the moral faculties, is to pretermitt one principal purpose of education in its justest sense; but the understanding and the heart may best be developed and disciplined in conjunction, and whatever exceptions we may fancy or find to exist, yet, taking a comprehensive survey of mankind, it cannot be denied that, other things being equal, the best instructed people are in general the most orderly, and in the main the most virtuous people.

(2), *General education tends to improve the political condition of society.*

It is universally true that "those that think must govern those that toil," unless the toilers shall be taught to think also; and in popular governments, especially in those

where the right of suffrage is limited by no other condition than those of sex and adult age, the general education of the people can be deemed nothing less than an *indispensable* political requirement. How else can there exist that intelligent appreciation of public affairs amongst the people, upon the existence of which popular government is based, and without which the general interest can hardly fail to become speedily the prey of venal and corrupt men?

(3), *General education promotes the physical comfort and the material prosperity of society.*

As intelligence discovers and employs new appliances of domestic convenience, develops new sources of wealth, and makes labor more remunerative, by economizing expenditure and amplifying results, so education, which is a principal source of intelligence, is so great a creator of material strength that the proverbial philosophy of mankind announces emphatically that "knowledge is power."

Invention is more likely to be busy amongst persons of equal apprehension and extent of information, whose hands are habitually engaged with the actual process of work, than amongst those who, not being operatives, have no special need to make their "wit save their bones." If, therefore, every operative be furnished with the rudiments of knowledge, we may expect a far richer development of new discoveries, and a more abundant utilization of the powers of nature, than if the knowledge of these powers be confined to such as have no special daily occasion to employ them. To supply knowledge to the working classes is to bring brains and hands into conjunction, and to subject both to the stimulus of social needs instead of leaving them to work separately, hands in dull despair, and brains in aimless and unpractical speculation!

(4), *General education tends to augment the productiveness and the market value of the lands of a community.*

That the productiveness of lands will be enhanced by the increased intelligence of those employed in their cultivation, is self-evident as a general truth: and especially is it so if the intelligence pervades, not the class of proprietors and managers only, but also of common laborers and operatives. The man whose hands have the work to do, and whose eyes are every minute upon the subject of his labors, if he has the rudiments of knowledge, or even so much of the habit of inquiry awakened as to notice phenomena, and to be accustomed to investigate the "why and because," is pretty sure to make a progress and to develop improvements, which it would be unreasonable to look for where labor is not intelligent, and intelligence is not laborious.

The market value of lands of course increases with their

productiveness, but where general education prevails it is further increased by the greater order and virtue of society, the diminution of crimes of violence and brutality, the superior standard of comfort, the elevation of tastes, and the progressive refinement of the community.

These considerations, then (to which if there were occasion others scarcely less potent might be added), seem satisfactorily to demonstrate that the *whole of every community* is vitally concerned in the education, moral, mental and physical, of *every person belonging to it*. The object, therefore, is one proper for governmental interposition (like the construction of roads and the maintenance of the poor), if it cannot be otherwise attained; and the question is simply, as in other cases of the interference of government to achieve general benefits which individuals are incompetent by their unaided efforts to reach, as to the extent and the best method of intervention.

There are but four modes of general education, namely :

1, Every parent may be left to provide for his children such instruction as he can, without the government concerning itself therewith.

2, The government may undertake to assist the *indigent alone*, leaving the rest of the community to shift for themselves.

3, The government may give *partial aid to all*, leaving each some additional expense, much or little, to bear, in the shape of tuition fee, or otherwise.

4, The government may provide, at the common expense, for the complete *elementary instruction* of all classes, just as it provides for the protection of all.

It so happens that all these systems have been severally tried for long periods of time in enlightened countries, so that we know accurately what each can do towards the *desideratum* of instructing the people, the results in each instance being in accordance with the principles indicated.

Thus, under the *first system*, which may be represented by England (which, however, has recently exchanged it for the *third*), the density and pervasiveness of the popular ignorance are well calculated to alarm, as it has alarmed, the government, threatening to be the more dangerous in proportion to the freedom of the institutions amongst which it is allowed to subsist.

In Virginia the *second system* has disclosed results in a high degree unsatisfactory, and since 1870 has been abandoned for the *fourth*; as it also has been, for the most part, in all the States of the South and West.

The *third system* illustrated its imperfections in New York, Pennsylvania, and several States of the Northwest for a number of years, until, about 1854, the two States

first named exchanged it for the *fourth*; as, before or since, most, if not all, of the Northwestern States have also done.

The *fourth system* has been carried out with persistency and marked success in Prussia, Switzerland, Holland, and New England, and for a score of years in New York, Pennsylvania, and the States of the Northwest, reducing the percentage of "*illiterates*" in those several communities to a very low figure.

In the light of these examples, and of the suggestions which preceded them, the conclusion seems to be amply warranted, that it is the interest and the duty of the whole of any State to see to it that *primary education* is secured for *every child* within its limits; and that the *only way* to accomplish this result is by *maintaining primary schools at the public charge, freely accessible to all, without individual expense to any*.

How far it may be also the duty of the State to establish and maintain higher institutions of learning, calculated to impart the most liberal education, is determined by very similar considerations, modified, however, in the application, according to the difference in the subject, and in the surrounding circumstances.

It is certain that the possession of a higher order of education by a due proportion of a community, if not as indispensable to the well-being of the whole as a less degree of instruction *for all*, is yet of such value as not to allow of its being overlooked, nor of a provision for it, in some way, being pretermitted. If there be no higher seminaries, and no more advanced education than the common schools can afford, the common schools themselves, for want of duly qualified teachers, for want of an elevated standard of attainment, and for want of an enlightened public sentiment, must languish and decline; whilst very much of the industrial, political, and moral prosperity and advancement of the State, for want of wise and deeply-instructed directors and guides, must come to a pause, and go backward to decay.

The question as to such higher institutions (their necessity being admitted), is, first, whether they can be erected and maintained without contribution from the State; and, second, whether, supposing them to exist, it is requisite to make them, as in the case of common schools, *free to all*. The solution of the first proposition depends on the wealth or poverty of the people. In Virginia there never has been, and far less is there now, such a superfluity of disengaged capital as to justify the expectation that an institution of the highest grade can be erected or maintained by private benefactions. If such a

seminary is to exist at all, it must, under ordinary circumstances, derive its origin and a liberal annual maintenance from the public treasury. The great annual expense attending the administration of a collegiate institution of the highest class renders a considerable endowment, either from a fixed capital or from an annual appropriation, an indispensable condition. Such a seminary cannot be self-sustaining at any time. If the pupils are required to pay more than one-third to two-thirds of the total necessary cost of operating an institution of that character, it becomes too oppressive, and a very large proportion of the youth of the land must be deprived of its advantages, whilst the institution itself must soon expire from inanition, or be degraded to one of lower pretensions.

As to the second question, whether collegiate education, like that of common schools, should be *gratuitous*, and at the public charge, it is obvious that, whilst the children of all classes successively require and may profit by the instruction of common schools, a very small proportion of the youth of any country need, or are in a condition to avail themselves of collegiate teaching. There is not, therefore, the same universal *demand* for free college instruction as for free primary instruction. Nor is there the same *necessity*. When a youth is possessed of knowledge enough to fit him for college, he may generally, with a proper manliness of resolution, and with perseverance, defray the expense of *instruction* there by his own efforts. It would seem, therefore, that however it may be expedient to extend extraordinary aid to a few of superior promise, there is no duty resting upon the government to make collegiate teaching free, but only to provide, if individual benefactions do not suffice for the purpose, that there shall be an endowment sufficient to reduce the cost to be paid by individual pupils to a standard not beyond the means of that class of persons who are likely to avail themselves of its advantages.

The general subject of the education of the people ought not to be dismissed without adverting to the policy of *compulsory education*. It can hardly be denied that the reasonings which justify a system of *free schools* may be extended to prove that it is competent to the government also to coerce parents to give their children the benefit of them; but it by no means follows that it would be expedient to do so. There are many things which every government, especially every State government, has the power to do, which, were they done, would be pernicious in the extreme. Circumstances may be conceived where coercive attendance at school might be adopted as a *police measure*, to keep vagrant children of a crowded city from mischief

or crime; but it is hard to realize any condition of things under which it would be prudent to enact a general law of that character, applicable to all localities indiscriminately. And although the existing constitution of Virginia (Art. VIII., § 4), expressly empowers the General Assembly to enact such laws, it may be expected that that body will be very slow to exercise the authority.

Let us now take a brief survey of the system of primary instruction which is instituted in Virginia, with a short sketch of the history of the subject amongst us.

So early as 1779, Mr. Jefferson, whose mind was deeply penetrated with a conviction of the indispensable need of an effective scheme of popular education, having undertaken, at the request of the General Assembly, in conjunction with Messrs. Pendleton and Wythe (the most distinguished jurists of that day in the commonwealth), to make a revisal of the laws adapted to the new republican structure of government, proposed an act whereby every county should be divided into *wards* and *districts*, and a sufficient tax be levied to maintain, not elementary schools only, but academies, colleges, and an university. In 1796 this law was in substance actually enacted, but with a single feature which annulled its efficiency. It was left to the county courts to determine whether or not the act should go into effect in their respective counties. And Mr. Jefferson, adverting to the failure of the plan, remarks that "the justices (who then composed the county courts), being generally of the more wealthy class, were unwilling to incur the burden; so that it was not suffered to commence in a single county." (2 Stats. at Large (new series), 3; 1 Jeff. Mem. 38-'9.)

This law was one of four prepared by this truly great man, and which he characterized as "*the four columns of the Republican edifice.*" The other three, which took prompt effect, related to the abolition of *status tail*, the abolition of the right of *primogeniture*, and the establishment of the freedom of *religious belief*. Long after the fervor of authorship had subsided—indeed, only five years before his death—he holds the following language touching these measures:

"I proposed," says he, "three bills for the revisal, proposing three distinct grades of education, reaching all classes. 1st, Elementary schools for all children generally, rich and poor. 2d, Colleges for a middle degree of instruction, calculated for the common purposes of life, and such as would be desirable for all who were in easy circumstances. And 3d, an ultimate grade for teaching the sciences generally, and in their highest degree."

"One provision of the elementary school bill was that

the expenses of those schools should be borne by the inhabitants of the county, every one *in proportion to his general tax rate.*"

"I considered four of these bills passed or reported" (viz.: the school bill, bill for religious freedom, for abolishing entails, and abolishing the right of primogeniture), "as forming a system by which every fibre would be eradicated of ancient or future aristocracy, and a foundation laid for a government *truly republican.*" The people, "by the bill for a general education, would be qualified to *understand* their rights, to *maintain* them, and to exercise with intelligence their parts in self-government; and all this would be effected without the violation of a single natural right of *any one individual citizen.*" (1 Jeff. Mem. 39, 40.)

After the failure of the act of 1796, no provision for popular education seems to have been even seriously contemplated in Virginia, until about the year 1810. What is called the "*Literary Fund*" was then formed, to consist of confiscations, escheats, proceeds of *glebe-lands* belonging to the former colonial church by law established, forfeitures, fines, etc. It was subsequently swelled by two large accessions of moneys received by Virginia from the Federal government, and its capital, at the commencement of the late war in 1861, amounted to about \$2,260,000.

When the fund was first instituted the revenue derived from it was dedicated exclusively to the educating of "poor children." But in 1816, some transient interest having been awakened in behalf of education, Mr. Jefferson, ever watchful to advance his projects of patriotic beneficence, seized the occasion again to bring forward his great system of public instruction; and the next year his influence, although it was inadequate to effect the establishment of a system of free schools, which he had much at heart, yet procured an act to erect the University of Virginia, with a permanent endowment of \$15,000 a year out of the Literary Fund, the residue of the annual income from which was set apart, as before the whole had been, for the education of "poor children."

The system of primary education thus inaugurated, contemplating as it did *the poor alone*, and providing totally insufficient funds for even a small part of that class, was not wholly futile, but its results were meagre indeed compared with the exigency of the case. The proportion of ignorance existing under it, reckoning the white population alone, was deplorable, and was little diminished in the successive decades which elapsed prior to 1870.

The general impoverishment which succeeded the termination of the late war, together with the emancipation of the slaves, so diminished the means of supporting a

system of public education, whilst it doubled the expense of doing so (duty and enlightened expediency irresistibly demanding that like provision should be made for both races, yet in separate schools), as to postpone almost indefinitely the hopes of the friends of education to see a general system fully inaugurated. Their expectations, indeed, were limited to the institution in the State-government of a department of public instruction, trusting that, through the agency of such a bureau, the sentiment of the people might by degrees be sufficiently informed to cause them to adopt with alacrity, and sustain with vigor, some scheme of education adapted to the needs of all classes.

The result, however, which the *native* friends of the cause in the State were willing to postpone for a more auspicious season was precipitated by the action of that remarkable assemblage which, purporting to represent the sovereignty of Virginia, in 1868, devised the constitution which, the next year, the people of the commonwealth found themselves under the necessity of ratifying, with some important modifications.

The Constitution of 1869 (Art. VIII., § 3,) requires the General Assembly to "provide by law," at its first session under this constitution a uniform system of public free schools, and for its gradual, equal and full introduction into all the counties of the State by the year 1876, and as much sooner as practicable." And this constitutional requirement the legislature, at its first session under the constitution, in 1869-'70, loyally performed. It remains, therefore, to state the outline of the system upon this important subject, which, partly constitutional and partly statutory, at present prevails in this commonwealth. (Va. Const. 1869, Art. VIII., §§ 1 to 12; Art. VII., §§ 1, 2, 3; Art. VI., § 25; Amendments, 1874; V. C. 1873, ch. 78; V. C. 1887, ch. 66.)

The subject distributes itself under the following heads: I. The Organization of the System; II. The Funds Designed to Support the System; and III. The Regulations for the Government of the System.

I. THE ORGANIZATION OF THE SYSTEM.

The organization of the system contemplates that each county shall be divided into so many compactly located *magisterial districts* (substituted for townships by amendments of 1874) as may be deemed necessary, not less than three; and each *magisterial district* into so many compactly located school districts as may be necessary, but not to contain less than one hundred inhabitants, each school district being a *corporation*, capable of suing and being sued, of contracting, and of buying and holding property.

It contemplates, further, that the officers charged with the administration of the system shall be, (1), School-trustees, three for each school district; (2), A superintendent of public schools for each county; (3), A school-trustee electoral board for each county; (4), County school-boards, composed of the county superintendent and district school-trustees; (5), A superintendent of public instruction for the State; and (6), A board of education, with very extensive powers of supervision and regulation of the whole machinery.

It will be needful to survey more particularly these several classes of officials, for which purpose they will be taken in the inverted order:

(1), *The Board of Education.*

The board of education is a *corporation* composed of the governor, superintendent of public instruction, and attorney-general. It is the duty of the board to appoint, and to remove for cause, and upon notice to the incumbent, subject to confirmation by the senate, all county superintendents of public free schools; to provide gradually for uniformity of text-books, and the furnishing of school-houses with necessary apparatus and library, under regulations to be provided by law; to make regulations generally for the administration of the system; to submit to the legislature an annual report; to regulate according to law the management and investment of all school funds; and to exercise such supervision of schools of higher grades as the law shall provide. (Va. Const. 1869, Art. VII., § 3; Art. VIII., §§ 2, 6; V. C. 1873, ch. 78, §§ 3, 7, 15, 37, 38, 47, 64, 65; Acts 1876-7, p. 9, ch. 12; V. C. 1887, ch. 66 §§ 1429, 1433, 1471, 1472, 1481, 1503, 1504.)

(2), *The Superintendent of Public Instruction.*

The superintendent of public instruction is elected by the General Assembly, upon joint ballot of the two houses, to hold office for *four years*, and until his successor is qualified. He is charged with the general supervision of the public free school interests of the State; and to enable him to accomplish that object efficiently, he is clothed with large powers, and has a correspondingly wide circle of duties. Amongst other things it is his duty to interpret and expound the school laws; to prescribe the forms of registers and reports; to apportion the school funds to the several counties and cities; to make tours of inspection amongst the public schools of the State; to cause the school laws to be faithfully executed; to promote by all proper means an appreciation and desire of education amongst the people; and to submit to the General Assembly, through the board of education, an annual report, exhibiting all desirable statistics of numbers, expenditures

and results connected with the working of the school system. (Va. Const. 1869, Art. VIII., § 1; Art. VI., § 25; V. C. 1873, ch. 78, § 11; V. C. 1887, ch. 66 §§ 1436, 1471, 1472.)

(3), *County Superintendent of Public Free Schools.*

County superintendents of schools, one for each county, are appointed and removed for cause, and upon notice to the incumbent, by the board of education, subject to confirmation by the senate. The *term of office* of a county superintendent is three years, and until his successor is qualified. His *duty* is more immediately to supervise and control within his county the working of the system of free schools; to promote an appreciation and desire of education among the people; to prepare annually, or oftener if need be, under the direction of the superintendent of public instruction, a scheme for the apportionment of the State and county school funds among the school districts of the county; to examine persons applying for license to teach; to promote the improvement of teachers by all proper methods, under direction of the State superintendent; to visit all the public schools in his county as often as practicable, and inquire into every particular of their conduct and administration; to decide all questions and complaints within his county touching the school system, subject to appeal to the State superintendent, and from him to the board of education; to require annually, or oftener if necessary, from the clerks of the boards of district school-trustees full statistics touching the public free schools of their respective districts; to observe the directions of the State superintendent, and to make to that officer an annual report touching such particulars as he may prescribe. (Va. Const. 1869, Art. VII., § 1; Art. VIII., § 2; Art. VI., § 25; V. C. 1873, ch. 78, § 14; V. C. 1887, ch. 66, §§ 1437 to 1440, 1471, 1472.)

(4), *The County Board of School Commissioners.*

The county board of school commissioners is composed of three citizens of each county elected quadrennially by the General Assembly, to be known as the county board of school commissioners to go into office on the 1st day of April succeeding their election, and to continue for four years and until their successors are qualified. (V. C. 1887, ch. 66, §§ 1450 to 1457.) A majority of the board constitutes a *quorum*, and its function is to appoint school-trustees for the several school districts in the county, a duty which was at first devolved on the State board of education.

The county board of school commissioners elects one of their number chairman, and another secretary, and any vacancy in the board occurring in the recess of the legislature is to be filled by appointment by the county court for

the county, the appointee to hold office until his successor is elected and qualified. (V. C. 1887, ch. 66 § 1451.) The board holds its meetings when convened by any member, and has power to declare vacant the office of any school-trustee who shall fail to qualify in due time, or who fails to discharge the duties of his office according to law, and to fill the vacancies thus created or otherwise. (V. C. 1887, ch. 66, §§ 1456, 1454, 1455, 1474.)

(5), *The County School Board.*

The county school board is a *corporation*, composed of the county superintendent of schools and of the district school-trustees, under the style of "*The County School Board of ——— County*," with power to contract, take and hold property, and to sue and be sued. All property of every description dedicated to school purposes, for the use of the *county*, is vested in the county school board, unless inconsistent with the grant or devise, upon such terms and conditions for the security of the property as the court of the county shall prescribe. The board is to manage all such property, and apply the profits for the purposes of education, in the same manner and under the same restrictions as the general school fund is applied, except that the board may apply a portion, in their discretion, to the erection of school-houses, or the purchase of school apparatus; always provided that no disposition is made inconsistent with the grant or devise. The board is charged also with the duty of supervising the administration of all trusts for the purposes of common school education within the county, and to that end may require reports from the trustees, and, if need be, may "take immediate measures for carrying the matter before the civil courts." (V. C. 1873, ch. 78, §§ 15 to 20; V. C. 1887, ch. 66, §§ 1441 to 1447.)

(6), *The District School-Trustees.*

In each school district the county board of school commissioners appoints annually one school-trustee, whose term of office is three years, and until his successor is qualified; three having been appointed the first time for one, two, and three years, respectively. The three school-trustees constitute a board, of which one member is chairman, and another, clerk, the clerk's duty being to make annually a census of the school children in his district, to gather the statistics of education therein, to keep the records of the board and preserve its papers, and to perform such other duties as may be assigned him; for which he is allowed, out of the district school funds, two dollars a day for every day of service.

The board itself is charged with the duty of carrying the school system in detail into practical effect within its dis-

trict. It is to explain, enforce, and itself observe the school laws and regulations; to employ and dismiss teachers; to suspend and dismiss pupils; to supply text-books gratuitously to those too poor to procure them; to see that the school census is correctly taken; to convene meetings of the people of the district for consultation in regard to the school interests thereof; to prepare annually, and before the 15th day of November, to report to the president of the county school board, to be laid before the board at its earliest meeting, an estimate of the amount needed during the next scholastic year for providing school-houses, school-books for indigent children, and other school appliances, and necessary, proper and lawful expenses; to take care of and manage the school property of the district; to visit the public schools within the district from time to time, and to take care that they are lawfully and efficiently conducted; and to report to the county superintendent annually, and whenever required, according to the forms prescribed. (Va. Const. 1869, Art. VII., § 3; Art. VI., § 25; Art. VIII., § 12; V. C. 1873, ch. 78, §§ 22 to 31; V. C. 1887, ch. 66, §§ 1453 to 1455, 1469 to 1470.)

II. THE FUNDS DESIGNED TO SUPPORT THE SCHOOL SYSTEM.

The funds provided for the support of this educational system consist of, (1), *A fixed literary fund*, whose annual income alone is to be expended; and (2), *Annual funds*, derived from State, county and district taxes, etc.

(1), *The Literary Fund.*

The literary fund is composed of the remnant of the old literary fund (amounting, including arrears of interest due from the commonwealth, to somewhat over \$2,000,000), the proceeds of all public lands donated by congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeiture, and all fines collected for offences committed against the State, donations made for the purpose, and such other sums as the General Assembly may appropriate. These are to be set apart as a *permanent and perpetual* "Literary Fund," to remain *unimpaired and entire*, and the *annual income* arising therefrom is dedicated *exclusively* to the maintenance of *public free schools*. (Va. Const. 1869, Art. VIII., §§ 7, 8; V. C. 1873, ch. 78, § 66; V. C. 1887, ch. 66, § 1505.)

(2), *Annual funds*, derived from State, county, and district taxes, etc.

The *annual funds* (besides the income derived from the Literary Fund) consist of taxes levied on the counties severally, and donations made thereto, and taxes levied on the school districts, and donations made to them respect-

ively. (Va. Const. 1869, Art. VIII., § 8; V. C. 1873, ch. 78, § 67; V. C. 1887, ch. 66, § 1506.)

First, State Taxes, etc.

The State funds for public schools consist (besides the income from the Literary Fund) of a *capitation tax*, not exceeding one dollar per annum on every male citizen of twenty-one and upwards; and of such tax on property, from *one to five mills* on the dollar, as the General Assembly shall, from time to time, order to be levied.

Second, County Taxes, etc.

The county funds for schools embrace such tax as shall be levied by the board of supervisors of the county pursuant to law, fines and penalties arising from the violation of certain of the school laws, and donations made to the county for school purposes.

Third, District Taxes, etc.

The district funds for schools embrace such tax as shall be levied on the school district by the board of supervisors of the county pursuant to law, fines and penalties arising from violations of certain district regulations, and donations made to the district for school purposes. But prior to 1876 the county and district school tax together is not to exceed *two mills on the dollar* in any year.

III. REGULATIONS OF THE SYSTEM OF PUBLIC SCHOOLS.

Of the regulations which govern the school system, some are contained in the constitution, and some are statutory; whilst others again are prescribed by the board of education. Most of the provisions relate to *primary schools*, but some of those contained in the constitution contemplate seminaries of a higher order.

1, The General Assembly *has power*, after a full introduction of the public free school system, to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy. (Va. Const. 1869, Art. VIII., § 4; *Ante*, pp. 416-'17.)

2, The General Assembly is required to establish, as soon as possible, *normal schools* (that is, schools to instruct teachers in the art of teaching), and *may* establish agricultural schools, and such grades of schools as shall be for the public good. (Va. Const. 1869, Art. VIII., § 5.)

3, The General Assembly shall have power to foster all higher grades of schools under its supervision, and to provide for such purposes a permanent educational fund; and all grants and donations shall be applied according to the terms prescribed by the donors. (Va. Const. 1869, Art. VIII., §§ 9, 10.)

Thus, it will be seen that normal, agricultural and other higher seminaries are to be supported by funds separate and apart from those raised for *primary* free schools.

And whilst primary schools are submitted without reserve by the constitution to the supervision of the superintendent of public instruction, these higher seminaries are to be supervised by the board of education, and by that board only as the *law shall provide*. (Va. Const. 1869, Art. VIII., §§ 1, 2.)

4, Each city and county shall be held accountable for the destruction of school property that may take place within its limits by incendiaries or open violence. (Va. Const. 1869, Art. VIII., § 11.)

5, No member of the board of education, nor any school officer or teacher, is allowed to be in any wise concerned pecuniarily, in supplying books, stationery, school furniture, apparatus, etc., to the public schools, with some cautious relaxations in favor of authors and inventors. (V. C. 1873, ch. 78, § 38; V. C. 1887, ch. 66, § 1472.)

6, No teacher can be employed in the public schools until he has obtained a certificate of qualification from the superintendent of the county within which he is employed. Contracts with teachers are to be in writing, in a form prescribed; and they enjoy the same immunities as a school-trustee, namely, from serving on juries, working on roads (but not from the road tax), and from militia service in time of peace.

7, The board of education has power to invite and encourage meetings of teachers for mutual improvement, and to procure addresses to be made before such meetings touching the processes of school organization, discipline and instruction.

8, School houses and appliances, furniture and apparatus are to be provided by the several school districts, which have power to procure land to be condemned for school-houses, a just compensation being provided; and school-houses, and all school property are vested in the school district, and held by it as a corporation. (V. C. 1873, ch. 78, §§ 53, 54, 48; V. C. 1887, ch. 66, §§ 1487, 1488, 1482.)

9, The public schools are free to all persons between the ages of *five* and *twenty-one* years, residing within the school district; and, in special cases, to be regulated by the board of education, persons residing out of the district, or even out of the State, may be admitted. But white and colored persons are not to be taught in the same school, although there is to be no difference in the provision made for them. And no one is to be admitted whose father, if alive, and resident within the district, and not a pauper, *shall not have paid the capitation school-tax last assessed upon him*. (V. C. 1873, ch. 78, § 58; Acts 1877-'8, p. 10, ch. 14; V. C. 1887, ch. 66, §§ 1492 to 1496.)

10, The board of education is empowered and required

to regulate all matters arising in the practical administration of the school system which are not otherwise provided for. (V. C. 1873, ch. 78, § 7 (cl. 11); V. C. 1887, ch. 66, § 1433, (cl. 10).)

The provisions for public free schools in the cities and towns of the commonwealth, which are essentially the same as those already described, may be seen, V. C. 1873, ch. 79; V. C. 1887, ch. 67.

Before we pass away from the subject of public instruction, it is proper to observe, that our laws have always acknowledged, *in the abstract*, the value of education for the laboring classes, however remiss they may have been in making the needful provision for its universality. Thus, from a very early period of the colony, there has been an enactment, taken from the laws of the mother country, that when a child is "found begging," or is "likely to become chargeable" to the parish, an overseer of the poor shall obtain an order of the county or corporation court to bind him apprentice, stipulating with the master to teach him, not only his trade or business, but also "reading, writing, and common arithmetic, including the rule of three." (V. C. 1873, ch. 122, §§ 3, 2, 5; V. C. 1887, ch. 115, §§ 2583, 2585; 1 Bl. Com. 451.)

3^d. Powers of Parents as to Legitimate Children.

The power of parents over their children is derived from the consideration of the duty which they owe them; the authority being conferred chiefly to enable the parent to perform his duty more effectually, but partly also as a recompense for his care and trouble in the faithful discharge of it. And since the legal duty of parents is limited at common law to those under twenty-one years of age, so, also, is their authority confined to the same age. The municipal laws of some countries have, to be sure, upon the very same considerations, bestowed upon parents a very different degree of authority, and extended it to a different age. Thus, the ancient Roman laws gave the father a power of life and death over his children, upon the fallacious principle that he who gave life had also the power of taking it away. But the rigor of these laws was softened by subsequent constitutions; so that we find a father banished by the Emperor Hadrian for killing his son, though he had committed a very heinous crime (having debauched his step-mother), upon the maxim that "*patria potestas in pietate debet, non atrocitate consistere.*" But still they maintained to the last a very large and absolute authority; for a son could acquire no property of his own during the life of his father, but all his acquisitions belonged to the father, or at least the profits of them, for his life. (1 Bl. Com. 452; 2 Kent's Com. 203-'4; Hadley's Rom. Law, 119 & seq.)

The power of the parent, as conferred by the common law, is much more moderate, but still sufficient to keep the child in order and obedience;

W. C.

1^a. The Custody of the Child's Person, and the Power of Correction.

Let us observe, (1), The parent's right to the custody of the child's person, and his consequent power; and (2). The remedies whereby the parent may assert his right to the custody of the child when it is invaded;

W. C.

1^b. The Parent's Right to the Custody of the Child's Person, and his consequent Power.

The father has, against all other persons, the right to the possession and custody of his infant child under twenty-one years of age (*Latham v. Latham*, 30 Grat. 331; *Rex v. Greenhill*, 4 Ad. & El. (31 E. C. L.) 624; *St. John v. St. John*, 11 Ves. 531, 538; *Vansittart v. Vansittart*, 2 De G. & J. (59 Eng. Ch.) 256; 2 Kent's Com. (12th ed.) 193, and n. 1 (c); *Id.* 205); and on his death or disability, the mother, as the next natural protector and guardian, succeeds to the like authority, even as against the guardian appointed by the father's will, or by the court of chancery, at least until she marries again, as to such testamentary guardian, or guardian appointed by the court, and as to any other person, notwithstanding any subsequent marriage. And the parent, whether father or mother, who is thus for the time being charged with the care and custody of the child, may lawfully administer such moderate and reasonable correction as is for the benefit of his training and education. (1 Bl. Com. 452, & n. (9); 2 Kent's Com. 205; V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603; *Ex parte Hopkins*, 3 P. Wms. 154; *Armstrong v. Stone & ux.* 9 Grat. 105; *Carr v. Carr*, 22 Grat. 168, 174; *Latham v. Latham*, 30 Grat. 331 & seq.) The parent is also *by statute* charged with the power of consent to the marriage of his child under age, although, as we have seen, the want of such consent does not appear with us to invalidate the marriage. (V. C. 1873, ch. 104, § 3; V. C. 1887, ch. 100, § 2218; *Ante* pp. 266-67.) The power is conferred with a view to protect very young persons from the arts of the designing, and against the consequences of their own unweariness, inexperience, and heady passions, which might otherwise prevent their favorable settlement in life, and betray them into precipitate and imprudent marriages.

To invade this parental right of custody of the child by his abduction, is a civil injury, for which the parent may have redress either at law or in equity; and it seems it is

at common law an offence deemed worthy of exemplary punishment by fine and imprisonment. In Virginia, if the child be taken from the parent, or any one else having lawful charge of it, with intent to *extort money*, or any pecuniary benefit, it is felony. (V. C. 1873, ch. 187, § 15; V. C. 1887, ch. 180, § 3676.) And it is also a felony to take from any person having lawful charge of her, a *female child* under sixteen years of age, for the purpose of concubinage or prostitution (Id. § 17; V. C. 1887, ch. 180, §§ 3678, 3679); whilst *illegally* to seize, take, or secrete *any child* from the person having lawful charge of it, may, at the discretion of a jury, be treated as a felony or misdemeanor. (V. C. 1873, ch. 188, § 18; V. C. 1887, ch. 181, § 3713; 3 Bl. Com. 140-41, & n. (27); 4 Do. 219; Synops. Crim. Law, 81.)

The mother, if the father be dead, or if the child be *illegitimate*, is at common law the *natural* guardian, and entitled to all the legal authority usually exercised by the father; and this proposition, notwithstanding a loosely worded intimation to the contrary from Blackstone (1 Bl. Com. 453), is undeniably established by adjudged cases, as well as by approved text-writers. (Bac. Abr. Guardian, (A.) 3; 1 Th. Co. Lit. 155, n. (2); 1 Bl. Com. 461, n. (4); Mellish v. De Costa, 2 Atk. 14; People v. Landt, 2 Johns. (N. Y.) 375; Carpenter v. Whitman, 15 Johns. 209; Freto v. Brown, 4 Mass. 675; Wright v. Wright, 2 Mass. 109; Somers v. Dighton, 12 Mass. 383; Armstrong v. Stone & ux. 9 Grat. 102, 105.) As a general proposition, it is confirmed in Virginia by statute, although the statute limits it, where there is another guardian appointed by the court, or by the father's will, to the case of her *remaining unmarried*; it being enacted (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603), that although another person than the parent be "appointed as aforesaid" guardian, in order to take charge of the *infant's property*, yet the father, and if he be dead, the mother, while *she remains unmarried*, shall, if fit for the trust, be entitled to the custody of the person of the minor, and to the care of his education.

But whilst the parent is thus undoubtedly entitled, *prima facie*, to the custody of his minor child's person, it is because it is supposed that he will best execute the trust (of all trusts the most sacred) which God and society have committed to his hands. Hence, it is competent to a court of chancery, in pursuance of its general power to interpose for the benefit of such as are unable to protect themselves, to deprive him of such custody and control for sufficient reasons. The causes which have usually called forth this power are either the tender age or

physical infirmity of the child, causing it to stand in need of maternal care and attention, or some gross moral delinquency on the father's part, such as cruelty to the child, *habitual* drunkenness, blasphemy, profligacy, or other immorality, showing him to be clearly unfit for so important a function. The jurisdiction, however, is exercised only in strong cases, and with extreme caution, as indeed is plainly required by the delicacy of the considerations involved; and although it has been warmly contested in England, and especially in a comparatively recent case of great interest (*Wellesley v. Duke of Beaufort*, 2 Russ. (3 Eng. Ch.) 1), yet it is conclusively settled, as well upon reason and necessity (having regard to the *protective* power of the court of chancery), as upon the uninterrupted usage of more than one hundred and fifty years. (2 Rob. Pr. (1st ed.) 154; 2 Stor. Eq., §§ 1341 & seq.; *Duke of Beaufort v. Berty*, 1 P. Wms. 705; *Whitefield v. Hales*, 12 Ves. 449; *Creuze v. Hunter*, 2 Cox, 242; *De Manneville v. De Manneville*, 10 Ves. 59; *Ex parte Mountfort*, 15 Ves. 445; *Wellesley v. Duke of Beaufort*, 2 Russ. (3 Eng. Ch.) 1; S. C. 2 Bligh. (N. S.) 128; *Shelley v. Westbrook*, Jac. (4 Eng. Ch.) 266; *Lyons v. Blenkin*, Id. 257; *Ball v. Ball*, 2 Sim. (2 Eng. Ch.) 35; *Anon.* 2 Sim. (N. S.) (42 Eng. Ch.) 68; *People v. Mercen*, 8 Pal. (N. Y.) 47; S. C. 25 Wend. 64; *People v. ———*, 19 Wend. (N. Y.) 16; *Prather v. Prather*, 4 Desauss. (S. C.) 33; *Williams v. Williams*, Id. 183.) And in Virginia this equitable jurisdiction is recognized and confirmed by statute, which provides (V. C. 1873, ch. 123, § 13; V. C. 1887, ch. 116, § 2609) that the "circuit and corporation courts in chancery may hear and determine all matters between guardians and their wards, require settlements of the guardianship accounts, *remove any guardian for neglect or breach of trust*, and appoint another in his stead, and *make any order* for the custody and tuition of an infant," etc.

As incident to the parent's right to the custody of the infant child's person, and as the correlative of the obligation of maintenance, there results a right to the child's services, and to his wages if he earns any. That this is true of the *father* there appears no just reason to doubt, but whether it holds in respect to the *mother*, where there is no father, is very questionable; because, although the mother is entitled, in the case supposed, to the custody of the child's person, she is under no obligation, it seems, to afford maintenance. (1 Bl. Com. 453; 1 Pars. Cont. 257-'8, 256, n. (c); 2 Kent's Com. 194, 191; *Freto v. Brown*, 4 Mass. 675; *Jerney v. Alden*, 12 Mass. 375; *Whiting v. Earl*, 3 Pick. (Mass.) 183; *Fairmount R. R.*

v. Satter, 54 Penn. St. 375 (93 Am. Dec.) 715.) In respect to the father, not only does he lose his right to the child's wages when he ceases to be liable for his support, but he may relinquish his *right* whilst his *liability* continues; and, according to American cases, such relinquishment will be readily inferred from any conduct on his part which manifests such an intent. Hence, if the child be living apart from his father with his consent, or if the father leave him to manage his own affairs, and to make and execute his own contracts for a considerable time, or even if the father knew of such a contract and interposed no objection, he is understood thereby to relinquish his right to the child's wages. And he may do so notwithstanding he is insolvent. (1 Pars. Cont. 258-'9, and cases cited; Bac. Abr. Infancy (I.), 3; Id. (M.); Penn & als. v. Whitehead & als. 17 Grat. 522.) In England, emancipation from parental control is less easily inferred. It is laid down, indeed, that during the child's minority there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contracts some other relation, as by enlisting for a soldier, so as *wholly and permanently* to exclude parental control. (Rex v. Hardwicke, 5 B. & Ald. (7 E. C. L.) 176; R. v. Wilmington, Id. 525; R. v. Rotherfield Grays, 1 B. & Cr. (8 E. C. L.) 345.)

The right of a parent to sue for the seduction of a daughter, depends upon the parent's right to her services. That right may be *implied*, as in the case of a father it always is (unless he has relinquished it), as to a minor child, and *prima facie* as to an adult, while she lives in the father's family, or it may arise *expressly*, by contract, which contract is presumed whilst the daughter lives with the father.

Whether a *mother* is entitled to the services of her infant daughter, is very doubtful, to say the least, and it seems the better opinion that a mother can only maintain an action for her daughter's seduction by proving a *right to her services*, founded on *contract*, express or implied, and that the right to maintain such a suit does not, as in the case of the *father*, arise merely from the relation itself. (2 Greenl. Ev. § 575; Satterwhite v. Dewpriest, 4 Dougl. (26 E. C. L.) 315.) But see Sergeant v. ———, 5 Cow. (N. Y.) 115-'16; Coon v. Moffatt, (2 Penn. N. S.) 4 Am. Dec. 405, note.

2^h. The Remedies whereby the Parent may Assert his Right to the Custody of the Child's Person, when the Right is Invaded.

These remedies may be enumerated thus, namely, (1), The action of trespass *vi et armis* (or with us, trespass

on the case), to recover *damages*, but not the child's person, (2), The writ of *ravishment of ward*, whereby are recovered as well the body of the child as damages; (3), The writ of *habeas corpus*, to recover the child's person in certain cases; and (4), A bill in equity to recover the child;

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- 1st. The Action of Trespass *vi et armis*, or, in Virginia, of Trespass on the case.

In this action the parent recovers *such damages* as a jury shall estimate to be proper for the wrong done, but *not the body of the child*. (1 Bl. Com. 463, n. (9); Bac. Abr. Guard'n, (F.); Hussey's Case, 9 Co. 72 a; Rex. v. Smith, 2 Stra. 982; 1 Chit. Pl. 192; Vaughan v. Rodes, 2 McCord, (S. C.) 227.) It is apprehended that the action may also be, at common law, trespass *on the case*, to recover similar damages. (1 Chit. Pl. 192-'3.) But however it may be at common law, in Virginia, by statute, in any case in which an action of trespass will lie, there may be maintained an action of trespass *on the case*. (V. C. 1873, ch. 145, § 6; V. C. 1887, ch. 137 § 2901.)

- 2^d. The Writ of *Ravishment of Ward*.

By this writ, given by Stat. Westm. II., 13 Edw. I., c. 35, is recovered *the body of the child, together with damages for the taking and detention*, and not damages only, as by the remedy last mentioned. The statute is in terms applicable to *guardians*, but a parent may employ it as a *guardian by nature*. (1 Th. Co. Lit. 338; Bac. Abr. Guard'n, (F.); 1 Bl. Com. 463, n. (9); 3 Do. 141; Hussey's Case, 9 Co. 72, 74 b; Eyre v. Countess of Shaftsbury, 2 P. Wms., 122.)

The writ of ravishment of ward being a remedial writ, given by a general statute of England prior to 4 Jac. I., is reserved in Virginia by statute (V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3) to the use of our people.

- 3^d. The Writ of *Habeas Corpus*.

The writ of *habeas corpus* is proper only to relieve one from an *illegal restraint on his liberty*. It is therefore, only *collaterally* that the question of right to the custody of the child by the parent can arise upon the proceeding, and never where the infant has sufficient discretion to choose for himself with whom he will be, which may be supposed to be the case whenever he has attained the age of *fourteen*. Where, having attained the age of discretion, he is brought up on a writ of *habeas corpus*, if he is restrained of his freedom of locomotion, he will be released and suffered to go where he pleases; and if not restrained, but by his own choice

he is with his present custodian, the effect of the writ is exhausted, and the court cannot transfer him to the parent, notwithstanding it might be ever so well satisfied that the parent was entitled to his custody. But where the infant is too young to elect with discretion with whom he will stay (as if he be of the age of six or seven, or, it seems, of any age *under fourteen*), any custody but that of the person entitled to it is wrongful, and may be deemed illegal restraint of the child; and so the court must determine, in order to give effect to the writ, whose is the proper custody, and must remand him thereto. (Rex v. Clarkson, 1 Stra. 444; R. v. Johnson, Id. 579; R. v. Smith, 2 Stra. 982; R. v. Delaval, 3 Burr. 1434; *In Re Pearson*, 4 J. B. Moore, (16 E. C. L.) 366; *Ex parte*, Skinner, 9 J. B. Moore, (17 E. C. L.) 278; King v. Greenhill, 4 Ad. & El. (31 E. C. L.) 624; King v. Isley & ux., 5 Ad. & El. (31 E. C. L.) 441; *In re Hakewell*, 12 C. B. (74 E. C. L.) 223; *Ex parte*, Witte, 13 C. B. (76 E. C. L.) 680; Armstrong v. Stone & ux. 9 Grat. 102.)

4ⁱ. Bill in Equity.

This is the most direct, usual, and eligible remedy, in general, to try the right of the parent to the custody of the child. The court of chancery, as representing the parental and protecting power of the commonwealth, has jurisdiction to determine controversies concerning the guardianship of a minor; to make orders for his support, if any property capable of being so applied be within the reach of the court; and in extreme cases, as we have seen, even to control the right of a father to the custody of his child. (2 Stor. Eq. § 1340; *De Manneville v. DeManneville*, 10 Ves. 52; *Ex parte*, Skinner, 9 J. B. Moore (17 E. C. L.), 278; *The People v. Chegary*, 18 Wend. (N. Y.) 637; *Armstrong v. Stone & ux.* 9 Grat. 105-'6; V. C. 1873, ch. 123, § 13; V. C. 1887, ch. 116, § 2609.)

2^g. Parent's Power to *Consent to the Marriage* of a Minor Child.

The common law did not demand the consent of parents, in order to legalize, or even to make regular, the marriage of an infant. In England, by Stat. 4 & 5 Ph. & M., c. 8, heavy penalties were imposed on any person who should marry a woman-child under the age of *sixteen years*, without consent of parents or guardians, and her estate was, moreover, transferred during the husband's life to the next heir; and by 6 & 7 Wm. III., c. 6, and other statutes, a considerable fine was laid on any clergyman who should celebrate a marriage without the publication of *banns*, which would give notice to parents and guardians, or with-

out a license, to obtain which their consent must have been sworn to. But by Stat. 26 Geo. II., c. 33, marriages celebrated *by license* (for banns suppose notice, where either party is under twenty-one (and not previously *widowed*, in which case they are emancipated), without the consent of the father, or if he be dead, of the mother or guardian, were declared to be *absolutely void*. This innovation upon the ancient law, whilst it had the expedient effect of preventing the clandestine marriage of minors, was found, upon the whole, to be pernicious, by tending to obstruct the increase of population, and by betraying the single of both sexes, especially among the lower classes, into licentiousness and debauchery, particularly affecting the presumed wife, whose very innocence and simplicity exposed her peculiarly to be deceived. Dissatisfaction with this state of the law led at length to the Act of 4 Geo. IV., c. 76, and of 6 and 7 Wm. IV., c. 85, whereby the consent of parents and guardians was *directed* to be obtained, and marriage without it was made *penal* in the parties and their abettors, but *neither void nor voidable*. And the subsequent statutes appear to adopt the same policy. (1 Bl. Com. 437 ; 2 Steph. Com. 286, 288 & seq. ; Rex v. Birmingham, 8 B. & Cr. (15 E. C. L.) 29.)

In Virginia, as we have seen, the law is in a state of some uncertainty upon this point ; but upon the whole, it appears to be the better opinion that the terms of the statute requiring license, and consent of parents or guardians, where either party is under the age of twenty-one years, and not before married (V. C. 1873, ch. 104, §§ 1, 3 ; V. C. 1887, ch. 100, §§ 2216, 2218), are *directory only* ; and that the marriage is not invalidated by the want of a license, or of the consent of parent or guardian. (*Ante*, p. 267 ; Grot. de Jur. Bel. &c. B. II., c. v. § 16 ; Rex v. Birmingham, 8 B. & Cr. (15 E. C. L.) 29.)

3^d. The Power and Control of Parents *over the Minor Child's Estate*.

The parent, as such, has no power or control whatever over the infant child's property, real or personal. Hence, the father is not, by virtue merely of the parental relation, entitled to receive a legacy payable to his child, even though the testator may have *verbally* so directed on his death-bed ; and if the executor make payment to him, it is in his own wrong, and he is liable to pay it over again should the father fail duly to appropriate it. In order to qualify himself to deal with the property interests of his minor child, a parent must be duly appointed *guardian*, by a competent court, and must give bond and security as required by law. (1 Bl. Com. 453 ; 2 Lom. Ex'ors, 251 '2 ; 2 Rob. Pr. (1st ed.) 155 ; Dagley v. Tolferry, 1 P. Wms. 285 ; Cooper v. Thornton, 3 Br. C. C. 96.)

If, however, another person than the parent be appointed guardian, in order to take care of the infant's property, the father, or if he be dead, the mother, while she *remains unmarried*, shall, if fit for the trust, be entitled to the *custody of the minor's person*, and to the *care of his education*. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603.)

4^g. Parent's Power to *Delegate his Authority*; w. c.

1^h. Parent's Power to Delegate his Authority *during his Life-time*.

The power of the parent to delegate his authority, during his life-time, to the tutor or schoolmaster of his minor child, is acknowledged at common law. The tutor is then *in loco parentis*, and has such a portion of the parental authority as may be necessary to answer the purposes for which he is employed. But this power must be temperately exercised, and no schoolmaster should feel himself at liberty to administer chastisement to the same extent as the parent might, howsoever the infant delinquent may seem to have deserved it. (1 Bl. Com. 443, and n. (12).)

But this parental power does not extend to apprenticing a minor child, without his assent, expressed for the most part by his being a party to the indentures of apprenticeship, which, without the child's concurrence, are at common law, not merely *voidable*, but as to him, *totally void*. (*Ante*, p. 200, 1ⁱ; Bac. Abr. Master, &c. (A.) 1; Rex v. Armesby, 3 B. & Ald. (5 E. C. L.) 584; Pierce v. Massenberg, 4 Leigh, 493.) And in Virginia, by statute, if the minor be *under fourteen years of age*, the county, or corporation court must add its sanction, which is supposed is designed to be instead of that of the infant. (V. C. 1873, ch. 122, § 1; V. C. 1887, ch. 115, § 2581.)

2^h. Parent's Power to Delegate his Authority *after his Death*.

The parent possessed at common law no power to delegate his authority after his death. Such power, wherever it exists, is exclusively statutory, and is, therefore, regulated by the *terms of the statute*. It was first conferred in England by 12 Car. II., c. 24 (A. D. 1660), in consequence of the abolition of the *chivalry-tenure of land*, to which, down to that time, the wardship most frequently recurring had been incident. Wardship *in chivalry* having ceased to exist, along with the tenure to which it belonged, the statute in question proposed to clothe the father with power to substitute the guardian in chivalry by one of his own selection. Accordingly, by 12 Car. II., c. 24, it was enacted that the *father* (but not the mother) might, *by deed or will*, confer the custody of

his child, either born or unborn, on whom he will (except a Popish recusant), *until the age of twenty-one*. (1 Bl. Com. 453, 462; Bac. Abr. Guardian, (A.) 3.) In Virginia, a similar power may be exercised by the *father*, but *by will only*, and not by deed. And the guardian thus appointed is entitled, not only to the custody of the ward's person, saving the *right of the mother*, as already explained (*Ante*, p. 434, 3rd), but also (as it will be remembered, the parent, *as such*, is not), to the possession, care, and management of his estate; for the due administration of which, therefore he must give *bond and security*.

5th. Period when the *Parent's Power Terminates*.

The power of the parent over his child terminates at marriage, as is supposed, or at the age of *twenty-one*; for the child is then enfranchised, being supposed to have arrived at the age of full discretion, at least at that point which the law has established, as some must necessarily be established, when the empire of the father or other guardian gives place to the empire of reason. (1 Bl. Com. 453.) At what period precisely it is that the age of twenty-one is reached, whether on the last or the first moment of the twenty-first anniversary of birth, or, as Blackstone and other text writers strangely affirm (1 Bl. Com. 463 and n. (12),) on the *day preceding* that anniversary, will be explained in connection with the next chapter of Guardian and Ward, (*Post*, p. 463.)

4th. The *Duties of Legitimate Children to Parents*.

The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during minority, and honor and reverence ever after. They who protected the weakness of our infancy are entitled to our protection in the infirmity of their age. They who, by sustenance and education, have enabled their offspring to prosper, ought (at least in moral and religious duty, if not in legal obligation), to be supported by that offspring, in case they stand in need of assistance. And upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws. Let us then consider, (1), The duty of obedience to parents; (2), The duty of protecting parents; and (3), The duty of maintenance of parents;

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1st The Duty of *Obedience to Parents*.

The duty of obedience to parents on the part of minor children is a *perfect duty*, enjoined by the common law, and which it is lawful for the parent to enforce, as we have seen, in his own domestic forum, by reasonable restraint and correction, and that for the child's benefit. How far

the parent's authority may be aided and supplemented by the intervention of a court of equity, seems never to have been precisely determined in the case of a *parent*, although the power was asserted by Lord Hardwicke, in *Hill v. Turner*, (1 Atk. 516); but as that court assists any other guardian in coercing a just and reasonable obedience on the part of a ward, there seems to be no reason why it might not in like manner interpose, if the occasion demanded it, in behalf of a parent; although hapless indeed is the parent whose authority and control require thus to be sustained. Thus, in *Tremain's Case*, (1 Stra. 167), an infant ward having persisted in going to Oxford, contrary to the order of his guardian, who wished him to go to Cambridge, Lord Macclesfield sent his own tip staff to convey him from Oxford to Cambridge, and upon the youth's returning to Oxford, the chancellor dispatched his tip-staff again to carry him to Cambridge, *and keep him there*. So some years afterwards, in *Hull v. Hull* (3 Atk. 721), Lord Hardwicke obliged a lad of sixteen to return to Eton school, where his guardian had placed him, and whence, contrary to the guardian's wishes, he had withdrawn. (2 Stor. Eq. § 1340.)

The child, owing to the parent this duty of obedience, cannot be expected, immediately after attaining his age, to shake off at once the influence of long habit and duty; and for that reason transactions of business between a parent and a child just come of age are viewed with a jealous eye, and if any undue influence appears to have been exerted, and especially if any advantage has been taken of the child, a court of equity will interpose and cancel the contract or conveyance, provided the application be not unreasonably postponed, until other persons have acquired rights from the transaction, or by the death of the parent or otherwise, the explanation of the suspicious circumstances has become impossible or difficult. But whilst the mere relation of parent and child weighs much in deciding a question of alleged fraudulent advantage, where other circumstances conspire to prove the charge, yet the transaction is never to be set aside exclusively because of the relation; nor even though some influence shall seem to have been employed, if the arrangement entered into between the parties be reasonable, and for a laudable purpose. (*Corking v. Pratt*, 1 Ves. Sr. 401; *Corry v. Corry*, Id. 19; *Heron v. Heron*, 2 Atk. 159; *Young v. Peachy*, Id. 258; *Blackborn v. Edgeley*, 1 P. Wms. 607; *Kinchant v. Kinchant*, 1 Bro. C. C. 369; *Brown v. Carter*, 5 Ves. 879; *Haguenin v. Beazley*, 14 Ves. 289; *Waller v. Armistead's Adm'rs*, 2 Leigh, 11; *Jenkins & al. v. Dye & al.* 12 Pet. 253-4.)

2^g. The Duty of *Protecting Parents*.

The duty of protecting parents, like that of protecting children, is hardly capable of enforcement by law, and is, indeed, rather permitted than enjoined. A child may uphold his parent in law suits without being guilty of the legal offence of *maintenance*; and he may justify an assault and battery in defence of his parent's person as much as of his own. Nor does the permission thus extended to the child vary, as in the Athenian laws, as mentioned by Blackstone, with the character of the parent, the ties of nature not being dissolved by the parent's misconduct. A child, therefore, is equally justified in defending the person or in maintaining the suit of a bad parent as a good one. (1 Bl. Com. 454; *Ante*, p. 410, 2^g.)

3^g. The Duty of the *Maintenance of Parents*.

The common law lays not upon children any *legal* obligation to maintain their parents, whatever may be their ability or the parent's need, leaving the child who disregards so plain and high a moral and religious duty to the reprobation of society and the reproaches of his own conscience.

In England the Stat. 43 Eliz. c. 2, has come to the aid of the common law, and in order to *relieve the parish*, compels children, and perhaps grandchildren, if of sufficient ability, to maintain and provide for their progenitors. But this statute is not in force in Virginia; so that the doctrine here remains as at common law. (1 Bl. Com. 454, n. (13); 2 Kent's Com. 208; 1 Tuck. Com. (B. I.) 128; *Rex v. Munden*, 1 Str. 190; *R. v. Benoier*, 2 Ld. Raym. 1554; *Harshberger v. Alger*, 31 Grat. 66.)

2^e. Illegitimate Children, or *Bastards*; w. c.1^f. Definition of an Illegitimate Child, or Bastard.

A bastard, by the common law, is one who is not only begotten, but *born out of lawful wedlock*, or not within a competent time (from nine to ten months) after its determination, or who is born in lawful wedlock when procreation by the husband is *for any cause impossible*. (1 Bl. Com. 454, 456, & n. (14), 457.) Hence, one born a bastard is not, at common law, legitimated by the subsequent intermarriage of his parents, notwithstanding they acknowledge him as their offspring, a doctrine which is in direct conflict with the civil and canon laws, and for which Blackstone, with his wonted unhesitating commendation of the doctrines of the common law, assigns several very flimsy reasons, which he supposes may have influenced the brave and sagacious, but semi-barbarous, barons at the parliament at Merton (20 Hen. III., c. 9, A. D. 1325) to return their famous answer to the prelates who wished them to adopt, in this particular, the rule of the civil and canon laws—*quod*

nolunt leges Angliæ mutare. And hence, also, if the marriage be ascertained to be *unlawful ab initio*, whether for a *legal disability*, which, it will be remembered, makes it void *per se*, and *from the beginning* (*Ante*, p. 262, 1^k, 2^k), or for a *canonical impediment*, by means of a sentence of divorce *a vinculo* in the life-time of both parties, whereby the marriage is annulled *ab initio* (*Ante*, pp. 259-'60, 1^k, 2^k), the issue is in either case illegitimate, because not born in *lawful wedlock*. (1 Bl. Com. 456 '7.)

Upon these common law principles the statutes of Virginia have made very material and very wise innovations. Thus, it is enacted (V. C. 1873, ch. 119, § 6; V. C. 1887, ch. 113, § 2553) that if a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after the marriage (and even after the death of the child), shall be *deemed legitimate*. (Ash v. Way's Adm'r, 2 Grat. 203.) And also (V. C. 1873, ch. 119, § 7; V. C. 1887, ch. 113, § 2554) that "the issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate." (Stone v. Keeling, 5 Call, 143; Greenhow v. James, 80 Va. 636.)

- The definition of a bastard, therefore, is not the same with us as at common law, but may be expressed thus: "A bastard, in Virginia, is one born out of wedlock (lawful or unlawful), or not within a competent time after the coverture is determined (which time is ascertained by statute not to exceed *ten months*), (V. C. 1873, ch. 119, § 8; V. C. 1887, ch. 113, § 2555), or if born out of wedlock, whose parents do not afterwards intermarry, and the father acknowledge the child; or who is born in wedlock, when procreation by the husband is *for any cause impossible*."

From what has been said, it appears that all children born before matrimony are with us bastards, unless the parents afterwards intermarry, and the father acknowledge the child; and so it is of all children born so long after the determination of the coverture, by death or divorce, that, by the usual course of gestation, they *could not* have been begotten by the husband. But this being a matter of some uncertainty, the law is not exact as to a few days. The usual period is nine calendar months; but there is very commonly a difference of one, two or three weeks; and therefore, in order to prevent controversy, our statute has prescribed, as we have seen, a *maximum* period, in cases of *inheritance*, of *ten months*. "Any person in *ventre sa mere*, who may be born *in ten months* after the death of the intestate, shall be capable of taking the inheritance in the same manner as if he were in being at the time of such death. (V. C. 1873, ch. 119, § 8; V. C. 1887, ch. 113, § 2555.)

The uncertainty in point of fact of the precise period of gestation, gives occasion to a proceeding at common law, when a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate; an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death. In this case, at common law, and with us, the heir, or other person interested, immediately or contingently, may have a writ *de ventre inspiciendo*, to examine whether she be with child or not; and if she be, to keep her under proper restraint till delivered; which is also entirely conformable to the practice of the civil law; but if the widow, upon examination, be proved not pregnant, the presumptive heir or successor to the estate shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within the legal period.

The writ *de ventre inspiciendo*—which is said to be of *common right*, and not in the discretion of the court,—directs the sheriff or sergeant to summon a jury of twelve men, and as many women, by whom the female is to be examined (*tractari per ubera et ventrem*), in the *presence of the men*, the exigency of the case dispensing at once with common decency and respectful deference to the sex. If this mandate were strictly observed, according to its terms, it would be, as Mr. Hargrave justly observes, an *intolerable grievance*. It seems, however, that the courts have, sometimes at least, winked at the men's withdrawing themselves during the search. It appears from some of the reports, that it was so managed in Willoughby's case, mentioned below, although according to Croke, the writ was literally complied with. At all events, for more than a century past, the courts have been accustomed to make a previous order that the writ should issue unless by a designated time, and from time to time afterwards, the female shall submit to a satisfactory examination by women of skill, who may report her condition to the court; and thus the actual employment of the writ seems to have been avoided. (Reg. Brev. Orig. 227 a; 1 Th. Co. Lit. 143-4, & n. (7); Vin. Abr. Ventre Inspic'o, (A.); Willoughby's Case, 2 Cro. (Eliz.) 566; Theaker's Case, 3 Cro. (Jac.) 685; Aiscough's Case, 2 P. Wms. 591; *Ex parte Wallop*, 4 Bro. C. C. 90.) The exercise of such a *dispensing power* by the courts, in order to soften the rigor of the proceeding, suggests, in Mr. Hargrave's opinion, the expediency of a statute to regulate it, and bring it more in harmony with the demands of modern propriety: and, it might be added, to make the examination more trustworthy, by confiding it to two or three skilled persons.

If a man dies, and his widow soon after marries again, and a child is born within such a time as that, by the

course of nature, it might have been begotten by either husband, in this case, according to Blackstone (1 Bl. Com. 457), the child, when he arrives at the age of discretion, may choose which of the fathers he pleases. The better opinion, however, seems to be that the paternity *is a fact* which is to be determined *by the proofs*. Thus, in Theaker's Case, 3 Cro. (Jac.) 685, the husband, Theaker, died 15th February, 1623, and his wife Mary married Duncombe, who had been previously suspected of being her paramour, *within a week* afterwards. The cousin and heir of Theaker, the deceased husband, sued out the writ *de ventre*, etc., which was expressed in the form above described, and, according to Croke, was executed in conformity to its terms. She was found with child, and being delivered, the child, although born two hundred and eighty one days and sixteen hours after Theaker's death, was yet, notwithstanding her incontinency and her precipitate marriage, subsequently found, by the verdict of a jury, *to be the issue of Theaker*. (Lilly's Pract. Reg. 776-7; 1 Th. Co. Lit. 140, n. (2), (4); Alsop v. Bowtrall, 3 Cro. (Jac.), 5417.)

To prevent this ambiguous paternity, and also other civil inconveniences, the Roman law ordained that no widow should marry for a year, *infra annum luctus*; and the same constitution was probably handed down to our early British ancestors, from the Romans, during their stay in Britain; for we find it established under the Saxon and Danish governments, although lost sight of by the common law after the Conquest. (1 Bl. Com. 456-7; 1 Th. Co. Lit. 140, n. (2); Theaker's Case, 3 Cro. (Jac.) 685.)

As bastards may be born before the coverture is begun, and also after it has ended, so also, as may be gathered from the definition, children born *during wedlock* may be bastards where procreation by the husband appears *to have been impossible*. But *probabilities* in such a case are not to be weighed. The law presumes *absolutely* for the legitimacy unless procreation by the husband is proved to have been *impossible*. It admits of no inquiries, at once uncertain and indecent, amongst *mere probabilities*. Such impossibility may arise, not only from the husband's continued *absence abroad*, during the period when the child must have been begotten (according to a once prevalent idea), but from any cause whatever; as from the husband's *impotency*, growing out of his extreme youth (being under fourteen); from the *proved non-access* of the husband within such period as by the law of nature would render it possible for him to have begotten the issue; from *presumed non-access* (which, however, may be rebutted), in case of a divorce *a mensa et toro*; or from the child being of *mixed race* (*mulatto*), whilst the husband and wife are of unmixed, and of the same

race, as both white, or both negro. The fact of access, where it is *possible*, is always presumed conclusively; but non-access (that is, the non-existence of sexual intercourse), or rather the impossibility of access, under the circumstances, as well as the fact of impotency, may in all cases be proved by such legal evidence as is admissible in other instances where a physical fact is to be established. (1 Th. Co. Lit. 138-9, and n's (1), (B.) (2); Bac. Abr. Bastardy (A.); Banbury Peerage Case, 1 Sim. & Stu. (1 Eng. Ch.) 153; Head v. Head, Id. 152; 2 Greenl. Evid. § 150 to 153; Stegall v. Stegall's Adm'r, 2 Brock. 258; Lyle v. O. P. Ohio County, 8 Grat. 20; Watkins v. Carlton, &c. 10 Leigh, 574.)

A similar presumption of legitimacy arises when the child is *born in wedlock*, although at too short an interval after marriage to have been *begotten* in wedlock; and it prevails not only where the woman is *grossement enceinte*, in which case the marriage may fairly be regarded as a public acknowledgment by the husband that the child is his; but it is so also where the pregnancy was not obvious to view. The presumption of legitimacy can only be repelled, as in other cases, by proving the *impossibility* of procreation by the husband. (Bac. Abr. Bastardy, (A.); Bowles v. Bingham, 2 Munf. 442; S. C. 3 Munf. 599; Rex v. Luffe, 8 East. 193.)

2^d. The Duty of Parents to Bastards.

The parent (that is, *the father*) of a bastard owes him in law, for the most part, no other duty than that of *maintenance*; and he owes that not by the common law, but only by virtue of a statute. For though bastards are looked upon, so far as regards the father, as not his children to any definite civil purpose, yet the obligations of nature, of which maintenance is one, are not so easily dispensed with; and these obligations hold, indeed, as to many other particulars, as especially, that no marriage shall take place within the prohibited degrees of kindred: as for example, between (or with) bastard sons and daughters. The Roman law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances, was neither consonant to nature nor reason, however profligate the parents may have been. (1 Bl. Com. 458.)

W. C.

1st. The Mode of Compelling a Father to Support his Bastard Child.

The mode of compelling a father to support his bastard offspring is purely statutory, the obligation not being recognized by the common law, because it was conceived that there was no certain mode of ascertaining who the father was. The provisions of our statute, as hitherto it

has been, may be seen, V. C. 1873, ch. 121, §§ 1 & seq.; and although, by Acts, 1874-'5, ch. 112, p. 94, the statute has been repealed, apparently from apprehension of collision with the Federal authorities, yet as a sound public policy will almost surely soon demand its substantial reinstatement, it is deemed best not to pretermitt it.

The original complaint can be made by the *mother alone*, and not by the overseer of the poor, although the sole purpose of the proceeding is to *procure indemnity for the parish* against the expense of the bastard's maintenance. But after the accusation has been once made, the proceeding thereupon may be had at the instance either of *the woman* or of the *overseer of the poor*. (V. C. 1873, ch. 121, §§ 1, 3; Bac. Abr. Bastardy, (E.) β. 2, § 2, (p. 105); Mann v. Com'th, 6 Munf. 452.)

According to the terms of the statute (V. C. 1873, ch. 121, § 1), the complaint may be preferred by "any *unmarried white woman*" who "*has been delivered*" of a bastard child. But both the English cases and our own construe the statute, notwithstanding its terms, as applicable to the case of a *married woman* delivered of a child, who could not *possibly*, under the circumstances, *have been begotten by the husband*, from what cause soever the impossibility proceeds, whether from the husband's absence, and therefore, *non-access* (as in Rex v. Albertson, 1 Ld. Raym. 395; R. v. Luffe, 8 East. 193; Lyle v. O. P. Ohio Co. 8 Grat. 20); or from his *impotency* (as in Foxcroft's Case, 2 Rolle Abr. 353; Bac. Abr. Bastardy, (A.); Rex v. Luffe, 8 East. 193); or from the child being of *mixed race*, whilst the husband and wife are of unmixed, and of the same race (as in Watkins, &c. v. Carlton, &c. 10 Leigh, 574.)

The statute required the woman *to be white*, so that no provision existed under it to compel a putative father to maintain a bastard born of a *colored woman* (that is, a woman having *one-fourth or more of negro blood*), or of an *Indian woman* (that is, a woman having *one-fourth or more of Indian blood*). (V. C. 1873, ch. 103, § 2; V. C. 1887, ch. 6, § 49.) It has been thought by some, however, that this diversity, at least when the proceeding is by the woman herself, may be obviated, if not by the *civil rights act* of 1866 (14 U. States Stats. 27); yet by amendments to the U. S. Constitution, Art. XIV., § 1, whereby it is declared that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside;" that "no State shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States," nor "deny to any person within its jurisdiction the *equal benefit of the laws*." To

this suggestion it would seem to be a sufficient answer that the proceeding, as we shall presently see, is *solely for the indemnity of the parish*, and can in no case redound to the benefit of the mother, the parish being alike liable to support the child, and the mother not liable, whether the putative father can be subjected or not. It is not, therefore, a proceeding for the security of her *person or property*; and the State, by refusing to compel a putative father to maintain a bastard born of any other than a white woman, does not abridge the *privileges or immunities* of such a mother, nor deny to her the *equal benefit of the laws*. It is probable, however, that the retention of the word "*white*" will not be deemed indispensable, the discretion and discernment of the county and corporation courts affording adequate protection against the false accusations of colored women; and that the word will be ultimately stricken out.

The reader will observe that no accusation is, by the statute, permitted to be made until the woman has been *actually delivered*.

The complaint is to be preferred (V. C. 1873, ch. 121, § 1), before a justice of the peace of the county or corporation in which the woman has "*resided*" (that is, as is supposed, has been "*domiciled*"*) "*for the next preceding year.*" The justice is required to examine the woman "*under oath, and reduce her statement to writing, and sign it;*" and on such examination, "*unless the child appear to be seven years old*" (in which case it is supposed that it is not likely to become chargeable to the parish), "*a warrant may be issued requiring the person so accused to be apprehended and brought before a justice of the county or corporation in which he may be found, who shall require him to enter into a recognizance, with one or more sufficient sureties, in not less than \$50, nor more than \$200, to appear at the next term for the county or corporation in which the warrant is issued, to abide the order of the court,*" which recognizance is to continue in force until final judgment, unless the accused, being required, shall give a new recognizance, or shall be committed to jail. (V. C. 1873, ch. 121, §§ 1, 2; Mann v. Commonwealth, 6 Munf. 452; Howard v. O. P. Powhatan Co. 1 Rand. 464.)

At the hearing before the court, the woman is a *competent witness*, unless she has been convicted of some crime

*NOTE.—*Residence* is a more ambiguous word than *domicile*, and its precise import depends on the connection in which it is used. In statutes relating to taxation, settlements, right of suffrage and qualifications for office, it generally has the same meaning as *domicile*; whilst in statutes relating to attachments, as against a non-resident debtor, it signifies the act of abiding or dwelling in a place for some continuance of time. (1 Am. L. C. 899, 953; Drake on Attachm't, §§ 61 '2; Long v. Ryan, 30 Grat. 719; Pilson v. Bushong, 29 Grat. 240.)

(felony, or other *infamous offence*), which would render her incompetent in another cause. And the accused also, *if he desire it*, may be examined on oath, and his statement be weighed along with hers. If upon the whole the court shall adjudge the accused to be the father, it shall order him to pay to the overseers of the poor, for the maintenance of the child, such sums for each year as it may deem proper, until such time as the court may appoint, unless the child die sooner; the payment to be secured by bond, with sufficient sureties, and he to stand committed to jail until the bond be given in court or filed in the clerk's office, or the woman and the overseers consent to his discharge, or he be otherwise legally discharged. And as often as the condition of the bond is broken by non-payment, the money due, with lawful interest thereon, may be recovered in the court of the county or corporation, on motion of the overseers, on ten days' notice. The attorney for the county or corporation is required to appear on behalf of the woman, or of the overseers of the poor, in such motions, and in all the proceedings for bastardy. (V. C. 1873, ch. 121, §§ 5 to 8; Id. ch. 163, § 4; Bac. Abr. Bastardy, (E).)

It should be observed, that although in Virginia the woman is, by the terms of the statute, a competent witness, in some of the States there is a remarkable qualification that she must, *during her travail*, have charged the accused, whilst in others it is required that she should have *continued constant* in her accusation of him. And whilst with us there is express power conferred on the court to oblige the accused to continue the annual payments "until such time as the *court may appoint*, unless the child die sooner," such a vague and unlimited order, which might extend beyond the bastard's minority, would, independently of the statute, be quashed for uncertainty; and so also, even under the statute, would be an order to pay to the overseers *unconditionally* so much to a certain age of the child, because it might die meanwhile; and it is a fundamental principle underlying the subject, that the parish can never demand anything *but an indemnity* for the outlay actually incurred. (Bac. Abr. Bastardy (E.); Id. Bastardy (E.), §. 2, § 6 (p. 106); Rex v. Barebaker, 2 Salk. 478, pl. 24; R. v. Street, 2 Stra. 788.)

As the statute seeks to charge the putative father merely in order that he may *indemnify the parish* for the bastard's maintenance, he is liable only from the time the bastard becomes thus chargeable to the parish, although it is not necessary that the parish should have actually paid the money, if it is *liable to pay it*. (Bac. Abr. Bastardy (E.); Falls v. O. P. Augusta Co. 3 Munf. 495; Lyle v. O. P. Ohio

Co. 8 Grat. 20 ; Willard v. O. P. Wood Co. 9 Grat. 139.) It follows, also, that even if a bond were executed to the overseers for the payment of a given sum, at all events, it is still no more than an *indemnity*; and that is all the overseers can ask, or can recover upon it; so that no action can be maintained by them on such bond, if they have neither paid nor incurred any expense. Nay, if the putative father has paid the overseers a sum of money in gross, in satisfaction of the parish's demands upon him, and the child dies, the father may recover the residue unexpended, as money had and received to his use. It is, indeed, a transaction objectionable in point of policy, and not warranted by law, thus to receive a sum in gross, and if received otherwise than a mere indemnity, would tend to tempt the parish officers to neglect the child, or even to abridge its life. Hence, although the overseers who received the money have gone out of office, and have turned the money unexpended over to their successors, they are notwithstanding liable to an action therefor. (Bac. Abr. Bastardy, (E.); Cole v. Gower, 6 East. 110; Wilde v. Griffin, 5 Esp. 141; Watkins v. Hewlett, 1 Bro. & B. (5 E. C. L.) 1; Townson v. Wilson & als. 1 Camp. 397; Stainforth v. Staggs, Id. 398, note, & 564.)

To an action by the overseers upon such a bond of indemnity as is above supposed, it is no defence on the part of the putative father to aver an offer to take and keep the child himself, because he has no right to its custody, as we shall presently see, and besides that is no fulfilment of the condition of the bond. (Bac. Abr. Bastardy, (E.); Strangways v. Robinson, 4 Taunt. 498; Pope v. Sale, 7 Bingham. (20 E. C. L.) 477.)

2^g. The Custody of Bastard Children.

The putative father of a bastard, although constrained to support it, has still no claim to its custody, at least as against *the mother*. As against *a stranger*, it might be otherwise. (The People v. Landt, 2 Johns. (N. Y.) 375; Carpenter v. Whitman, 15 Johns. 209; Holland v. Malken, 2 Wils. 126; Rex v. Soper, 5 T. R. 278; R. v. Moseley, 5 East. 224, *in notes*; *Ex parte* Ann Knee, 1 Bos. & P. (N. R.) 149.) The mother, however, is the natural guardian of the child, primarily entitled to the care and custody of it; but subject, as we have seen legitimate parents also are, to be deprived of such custody by the court of chancery for grave reasons. (*Cases supra*; *Ante*, p. 428, 1^h.)

3^f. The Rights and Incapacities of Bastards; w.c.

1^k. The Rights and Incapacities of Bastards at Common Law; w. c.

1^h. The *Rights of Bastards* at Common Law.

The *rights* of a bastard at common law, in respect of property, are very few, being such only as he *can himself*

acquire; for he can *inherit* nothing, being looked upon as the *son of nobody*; and accordingly he is called sometimes *filius nullius*, and sometimes *filius populi*. But although considered *filius nullius*, with respect to inheritance and successions, the illegality of any incestuous matrimonial connection which he may form is as much noticed, and punished, as if he were legitimate. And although he can *inherit* nothing, not even a *surname*, yet he may gain a surname by reputation, and by that name, or by any other certain and unambiguous designation or description, may acquire property, real or personal, by grant or by will. It was, indeed, at one time supposed that a limitation to a bastard unborn, and yet *en ventre sa mere*, was void, because it was thought that he could only take by a name gained *by reputation*, which of course could only be after his birth. It is, however, well settled at present that all that is required is simply a description so definite as to ascertain clearly the individual who is intended to be the grantee or devisee. Hence, a bastard may take property by his name of reputation; by his acquired character as the acknowledged or commonly reputed child of a certain father; by his description as the *child of his mother*, which is hardly less certain than if he were legitimate; and although he be yet *en ventre sa mere*, by the description of the child of which a designated woman is *enceinte*, provided, in this latter case, there is no reference to the *paternity*. If that element (of the *paternity*) is introduced into the description, it renders the person intended *uncertain*, and so invalidates the grant or devise. Thus, a legacy to "the child of which A (an unmarried woman) is *enceinte*," is certainly good, and one to "the child of which A is *enceinte by me*," is as certainly void. There are cases, however, where the application of this distinction is nice and uncertain. Thus, if a testator says, "Whereas, A is *enceinte by me*, I bequeath to the child of which she is pregnant," such a legacy, the motive of the bequest, and the condition precedent to its taking effect, being the *fact* of his being the *father of the child*, which in law is not susceptible of proof, the legacy fails. But if the language of the will be, "Whereas, *I have reason to believe* that A is *enceinte by me*, I give the child of which she is now pregnant," such a legacy, the motive of the gift is *his belief*, whether well or ill founded, and the actual fact of his *paternity* is not drawn in question, and, therefore, the legacy is good. (1 Bl. Com. 459, & n's (19) and (20); 1 Rop. Leg. 177-8; 1 Th. Co. Lit. 148-9, & n. (H.); Metham v. Duke of Devon, 1 P. Wms. 529; Earle v. Wil-son, 17 Ves. 528; Wilkinson v. Adam, 1 Ves. & B. 422;

(Gordon v. Gordon, 1 Meriv. 141, 150, 153. Evans. v. Massey, 8 Price, 22.)

On the other hand, a legacy or other gift to the *unbegotten* illegitimate child of a designated woman, even irrespective of the father, is liable to objection on the score of the immoral tendency of such dispositions, if they were allowed, and for that reason would probably be held to be void. (2 Lom. Ex'ors, 36; Metham v. Duke of Devon. 1 P Wms. 529.)

The terms, child, son, issue, etc., are in general to be considered *prima facie* to mean, at common law, a legitimate child, son, issue, etc., so that a gift even by will to one's own *children*, or to the *children* of another, will exclude illegitimate children, unless something appears from the *will itself* (and not by *extrinsic proof merely*), sufficient to show that the testator intended them; as, for example, where bastards are plainly designated as beneficiaries, or where there are *no children but bastards*, and no reasonable *possibility of any*. This principle grows logically out of the maxim "*qui ex damnato coitu nascuntur, inter liberos non computantur*;" for as a bastard is not reckoned a *child*, it follows, of course, that he cannot take *merely* by that description, but that there must be something else indicating him as the person intended. This *something* must usually appear on the face of the will, and for the most part cannot be extrinsically proved; but that doctrine does not exclude proof of the surrounding circumstances in the light of which wills and other writings are always to be interpreted. (1 Bl. Com. 459, n. (20); 1 Th. Co. Lit. 148 & seq.; 2 Lom. Ex'ors, 34-5; 1 Rop. Leg. 81 & seq. 85 & seq.; Cartwright v. Vaudry, 5 Ves. 530; Wilkinson v. Adams, 1 Ves & B. 464; Swaine v. Kemmerly, 1 Ves. & B. 469; Beachcroft v. Beachcroft, 1 Mad. 430, 433; Woodhouselee v. Dalrymple, 2 Mer. 419; Gill v. Shetley, 2 Rus. & My. (15 Eng. Ch.) 336; Meredith v. Farr, 2 Yo. & Col. (27 Eng. Ch.) 525; Evans v. Davies, 7 Hare, (27 Eng. Ch.) 501; Dover v. Alexander, 2 Hare, (24 Eng. Ch.) 281-2.)

Though a bastard may be a reputed child, yet he is not such a child, at least on the side of the father, for whom, in consideration *of blood*, an use can be raised under the statute of uses. Thus, if one covenant, in consideration of *natural love and affection* for his illegitimate child, to stand seised of land to his use, no use arises, and the covenant operates nothing, for want of a sufficient consideration; the law taking no notice of any other kinship than such as arises through the pure channel of marriage, from *lawful blood*. (1 Bl. Com. 459, n. (20); 1 Th. Co. Lit. 147, & n. (8); Gilb. Uses, 113, 207; Worse-

ley's Case, 3 Dyer, 374 a.) And upon reasoning somewhat similar, it has been doubted whether equity will supply a defective conveyance from a father to an illegitimate child. This doubt, however, is considered as straining the objection too far, and the generally admitted doctrine is that equity will uphold and enforce, as founded on a meritorious consideration, an imperfect deed by a father, providing for his natural children and their mother. (2 Kent's Com. 216-'17; Annandale v. Harris, 2 P. Wms. 432; Kruge v. Moore, 1 Sim. & Stu. (1 Eng. Ch.) 61.)

If a bastard die, seised of real estate of inheritance without having devised it, and *without issue*, the estate at common law escheats to the king, or other immediate lord of the fee; but in view of the apparent hardship of this doctrine, it is usual in such cases to transfer the rights of the crown for a trivial consideration to some one of the relations. And so, likewise, in the case of personal estate, when a bastard dies intestate, and without issue, the king is entitled thereto, and it is customary for the Crown to grant the right of administration, and with it the right to the subject, to the next of kin, on whom letters of administration are conferred accordingly. (1 Bl. Com. 459, n. (20); 1 Th. Co. Lit. 150, n. (K.); Manning v. Napp, 1 Salk. 37; Jones v. Goodchild, 3 P. Wms. 33.)

A conveyance to a bastard and his heirs is a *fee simple*, although he can have no heirs but those of his own body, (1 Prest. Est. 468; Idle v. Cook, 2 Ld. Raym. 1152); and hence, a remainder limited after such an estate is void.

Bastards have their *primary* settlement in general in their *mother's* proper parish, having no father; so that if she be *illegally* removed by the parish authorities to another county, or betake herself thither as a vagrant, or lie in there in a licensed hospital for pregnant women, and thus the child comes to be born *out of her parish*, yet, notwithstanding, it has its legal settlement where her's is. (1 Bl. Com. 459.)

2^b. The *Incapacities of Bastards at Common Law.*

The incapacities of a bastard at common law resolve themselves principally into this, namely: that he cannot be heir to *any one*, neither can he have heirs but of his own body; for being *filius nullius*, he is therefore in law of kin to nobody, not even to *his own mother*, and has no ancestor from whom any inheritable blood can be derived; and in all other respects there is no difference between a bastard and another man. (1 Bl. Com. 459.)

Lastly, a bastard's incapacities may be removed by *making him legitimate*, in which case he becomes capable of inheriting and transmitting inheritance like other

persons. But this can be effected no otherwise than by the transcendent power of an act of parliament, as was done in the case of John of Gaunt's bastard children, by a statute of Richard II. (1 Bl. Com. 459.)

2^d. *The Rights and Incapacities of Bastards in Virginia.*

The common law in few things offends so much against common reason and justice as in its doctrine touching bastards. That a bastard should inherit neither name nor estate from an *unascertained father* is not unreasonable; but why should he not derive both *estate and name* from his mother, and transmit his own property to his *maternal* relatives? The pretension that the feudal barons would not be served by any vassal unless of stainless birth is in ridiculous contrast with their own habits of life; nor is the consideration that the doctrine in question encourages matrimony and discourages vice, and that it upholds purity of manners by enlisting on its side the sensibilities of nature for the reputation of one's offspring, sufficient to reconcile the understanding or the heart to the painful subversion which the doctrine occasions, of the obligations of kindred. The principle, indeed, seems to have no better real foundation than a desire to compound for personal immoralities by heaping marks of ignominy upon the innocent offspring of licentious love. The legislature of Virginia long since removed this stigma upon the good sense of the law by declaring (V. C. 1873, ch. 119, § 5; V. C. 1887, ch. 113, § 2552) that "bastards shall be capable of *inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten.*" Hence, where a bastard died seised and possessed of a considerable estate, real and personal, intestate, unmarried, and without issue, leaving as his nearest of kin his mother and two bastard brothers, his estate was distributed as it would have been had he and the brothers been all lawfully begotten, but by different fathers; that is, it was divided agreeably to the statute of descents (V. C. 1873, ch. 119, §§ 1, 2, 3, 10; V. C. 1887, ch. 113, §§ 2548 to 2550, 2557), into four parts, of which each brother (as being of the half-blood) had one, and the mother, taking with reference to the half-blood, a double portion, had two. (*Garland v. Harrison*, 8 Leigh, 358; *Hepburn v. Dundas*, 13 Grat. 219, 223 '4; *Lessee of Brewer v. Blougher*, 14 Pet. 178.)

It may be proper to remark that in *Stevenson's Heirs v. Sullivant*, 5 Wheat. 255, the supreme court of the United States, when as yet there had been no adjudication of Virginia courts upon the statute, interpreted its language as entitling bastards to inherit from the mother only, and not from the *collateral line* on the mother's side, as from a brother of the bastard. But this construction is wholly

overruled in the above stated cases of *Garland v. Harrison*, 8 Leigh, 368; and *Hepburn v. Dundas*, 13 Grat. 226-'7; and in *Lessee of Brewer v. Blougher*, 14 Pet. 178, is abandoned by the supreme court itself.

For a learned abstract of the rights and disabilities of bastards in different ages and nations, see note by Mr. Wheaton to *Stevenson's heirs v. Sullivant*, 5 Wheat. 262. And for the Roman law on the subject, the reader is referred to *Gibb. Decl. & Fall*, c. xlv.

Notwithstanding the objections which seem fairly to lie to the doctrines of the common law touching the disabilities of bastards, yet several of the States of the Union adhere to them in their rigor, and most have stopped considerably short of the provisions of our Virginia law. See 4 Kent's Com. 414-'15; 1 *Rop. Leg.* 80, n. (10.)

On the paternal side, the condition of bastards is unchanged in Virginia. As to the father, the bastard is still *quasi filius nullius*; the law indulges no presumption as to his paternity. A devise or bequest to him by his reputed or acquired name, or by a definite designation, is good, whether made by his father or a stranger; but the well-established common law doctrine is still applicable on the father's side, namely, that the word *children* does not include bastards, even in a will, save where the intention to do so is plain, as where bastards are clearly designated, or when there are no children but bastards, nor any possibility of any. (*Ante* p. 447, 1^h.) On the *mother's side*, however, our statutes have placed him in a very different position. As to her he does not remain *nullius filius*. It was the object of our law to give him, what at common law he had not, a mother. He is *her child* in law, as in fact, and as to her the maxim, "*qui ex damnato coitu nascuntur. inter liberos non computentur*," has ceased to exist. He *is to be counted* amongst the children of his mother, and as a consequence will take by virtue of a devise or gift to his *mother's children*, just as if he were legitimate. (*Bennett & ux. v. Toler & als.* 15 Grat. 631.)

And lastly a bastard's incapacities as to the father may be removed with us, as at common law, by *making him legitimate*. And this may be effected in Virginia, not only by Act of Assembly, but also by the man afterwards marrying the mother, and acknowledging the child, either before or after the marriage, and whether the child be then living or dead. (*V. C.* 1887, ch. 113, § 2553 *Ash v. Way*, 2 Grat., 203; *Bennett v. Toler*, 15 Grat. 631.)

CHAPTER XVII.

OF GUARDIAN AND WARD.

4^d. The Relation of Guardian and Ward.

This last of the private relations is nearly allied to that of *parent and child*. The popular idea of a *guardian* implies orphanage, or at least that the *father* is dead. This, however, is not the legal notion of a *guardian*. On the contrary, the first and most frequent instance of *guardianship* is that of *the minor's parents*. A guardian is defined to be one appointed, by the policy of the law, to take care of a minor's person or estate, or of both person and estate. (1 Bl. Com. 460; Bac. Abr. Guardian; 2 Kent's Com. 217.)

The Roman law styles one charged with the custody of a minor's person, and the care of his education, a *tutor*, and one to whom his estate is committed, a *curator*. Our law unfortunately denominates both sets of fiduciaries *guardians*, thereby giving occasion to not a little confusion of thought. The student, therefore, must take care to fix in his memory, in respect to each class of guardian presently to be described, whether he has charge of the *person only*, or of the *estate only*, or of *both person and estate*. (1 Bl. Com. 360; Dig. xxvi., Tit. iv., § 1.)

It is proposed to consider the subject thus:

1st. The different kinds of guardians, how they are appointed, and their power and duty, etc.; and

2d. The doctrine touching the capacities and incapacities of infants;

W. C.

1^e. The Different Kinds of Guardians, the Mode of their Appointment Severally; the Circumstances under which the Several Kinds of Wardship Occur; the Powers and Duties of Guardians; and Guardian's Accounts and Allowances; w. c.

1^f. The Different Kinds of Guardians, and Modes of their Appointment Severally.

Under this head will be stated the different kinds of guardians, common law and statutory, existing in England, proceeding to show whether or not they are respectively found in Virginia, together with the modes of appointing them severally.

The several kinds of guardians in England, are (1), Guardians *by* nature; (2), Guardians *for* nurture; (3), Guardians in chivalry; (4), Guardians in socage; (5), Guardians by election; (6), Guardians appointed by chancery courts; (7), Guardians appointed by the ecclesiastical courts; (8), Guardians under the Statute 4 & 5 Ph. & Mary; (9), Testamentary guardians; (10), Guardians by the custom of particular places; and (11), Guardians *ad litem*;

W. C.

1st. Guardians by Nature.

Guardians by nature exist by the common law. They are the *father*; or if he be dead, the *mother*; and if she too be dead, *any lineal ancestor* of the minor, to whom *he is heir*; the father having the first claim, the mother the second; and amongst more remote ancestors, he who first obtains possession of the infant, pursuant to the maxim *in equali jure melior est conditio possidentis*. (1 Bl. Com. 461.)

Guardianship by nature embraces only the custody of the minor's *person* and the *care of his education*, and does not include the care of his estate. It is applicable only to *heirs apparent*; and when exercised by the father or mother seems, as to the heir apparent, to be little more than the *parental control* treated of in the last chapter. As to infant children other than heirs apparent, this wardship is not applicable to them, but guardianship *for nurture*, presently to be described, until the age of fourteen. After the age of fourteen, during the rest of their minority, the younger children (not heirs apparent), although in general under no *wardship* to their parents, are yet subject to their parental control and authority, which, in its practical effects, seems to differ little, if at all, from a guardianship *of the person*.

The infant's estate, if he has any, is never committed to the guardian *by nature*, merely as such, but to some person duly appointed and qualified as guardian, by giving bond, etc., as required by law. (1 Th. Co. Lit. 155, n. (2); Bac. Abr. Guardian, (A.) 1; Ratcliff's Case, 3 Co. 37 b, 38 a, b; Armstrong v. Stone & ux. 9 Grat. 105, &c.)

In Virginia, *all children*, male and female, without regard to primogeniture, are heirs apparent of father and mother by our statute of *descents* (V. C. 1873, ch. 119, § 1; V. C. 1887, ch. 113, § 2548), and hence all are with us subject to the guardianship *by nature*, and such guardianship is otherwise attended with the same incidents as at common law. Thus, it extends to the *person only* and *not the estate*, and continues until the ward attains the age of twenty-one.

In consequence of its embracing *all the children* we are spared the necessity of considering practically the question which may arise at common law, as to the effect on the parental authority, in regard to the younger children, of the guardianship *by nature* applying only to the heirs apparent, and that *for nurture* continuing not beyond the age of fourteen. (1 Tuck. Com. (B. I.) 137.)

The student will not forget that the minor may be taken by the court of chancery out of the hands of a guardian by nature (even though it be a *father*) whenever he is

plainly and grossly unfit for it by habits of drunkenness, of blasphemy, of licentiousness, etc.; and that in Virginia this jurisdiction (undubitable, apart from the statute—seems confirmed by it. (V. C. 1873, ch. 123, § 13; V. C. 1887, ch. 116, § 2609.) The provision is that the circuit, county or corporation courts in chancery “may remove *any guardian* for neglect and breach of trust, and appoint another in his stead, and make any order *for the custody and tuition of an infant.*” See authorities formerly cited, and especially 2 Stor. Eq. §§ 1341, &c.; 2 Rob. Pr. (1st ed.) 154; *Id.*, p. 428, 1^b.

2*. Guardians for Nurture.

This guardianship is also of common law origin. It occurs only where the infant is *without any other guardian*, applies to those children who are *not heirs apparent*, and continues only until the ward attains the *age of fourteen*. It embraces only the care of *the person*, and *not of the estate*, and belongs only to the father and mother. And when at the age of fourteen it terminates, the *parental authority* appears to remain in full force, as to the subjects of guardianship *for nurture*, until the age of twenty-one. (1 Th. Co. Lit. 155-6, n. (3); Bac. Abr. Guardian, (A.) 1.)

In Virginia guardianship *by nature* seems to have superseded guardianship *for nurture* by superseding the occasion for it. (2 Kent's Com. 221; 1 Tuck. Com. (B. L.) 137.)

3*. Guardians in Chivalry.

This is a common law guardianship. It was incident exclusively to the tenure of lands by *knight-service*, or chivalry, and occurred only when the infant was seised *by descent* of lands holden by that tenure.

The wardship belonged to the *lord of the fee*, of whom the lands were holden, and included not only *the infant's person*, but also such of his lands as were within the guardian's seignory; and where the king was the lord, it included the *whole of the infant's estate*, of whomsoever holden, whatever the tenure, and whether lying in tenure or not.

The wardship applies to such *male heirs* as, at the ancestor's death, were under twenty-one, and to such *female heirs* as were then under fourteen; continuing, *as to males*, until twenty-one, and *as to females* until sixteen or marriage, having the preference, with respect to the custody of the infant's person, over every other species of wardship, except only *that of the father*, in case of *the person* of his *heir apparent*, even the mother being postponed.

The incidents of this wardship were very remarkable and very oppressive. Thus it was for the *benefit of the lord*, who enjoyed the infant's estates in his hands, *without accountability for profits*, being only obliged to main-

tain the ward. And the lord was also entitled to *the marriage of the ward*; that is, to as much as he could get for the alliance; and if the ward refused, he forfeited the *value of the marriage* to his guardian. The nature and explanation of these incidents are set forth by Blackstone (2 Bl. Com. 67-'8), to which the student is referred. See 2 Min. Insts. 64.

Wardship in chivalry ceased with the tenure out of which it arose, which was virtually abolished by Stat. 12 Car. II., c. 24. A short history of it, showing why the English people endured it so long, the devices resorted to in order to mitigate its oppressiveness, and the slow decline which it underwent before it was finally abolished by 12 Car. II., c. 24, is given very interestingly by Mr. Hargrave. (1 Th. Co. Lit. 152, n. (1); see also Ratchiffe's Case, 3 Co. 37 b, n. (A.); Bac. Abr. Guard'n, (A.) 1.)

There never was any tenure *by chivalry* in Virginia. All our lands were granted by the Crown, to be held "*in free and common socage*, as of the king's manor of East Greenwich." And consequently there was never in Virginia such a guardianship as that in chivalry.

4^g. Guardians in Socage.

The guardianship in socage exists at common law, as an incident to lands held *by socage tenure*. It occurs where the infant is seised *by descent*, of lands or other hereditaments holden by that tenure, and is conferred on the *next of kin* to the infant, who cannot *possibly inherit* the lands from him, a precaution adopted in order to remove from the guardian all temptations to employ foul means to clear the way to his own succession. (1 Bl. Com. 461; 1 Th. Co. Lit. 168, n. (14).)

Unlike guardianship in chivalry, it is in no respect for the profit of the guardian, but exclusively for the *benefit of the ward*. It is therefore neither a subject of *alienation* nor *succession to the personal representative*, as guardianship in chivalry was; and the guardian must account *for all the profits* of the ward's estate.

Although it exists as incident to *tenure*, it draws to it the custody of the *ward's person*, and of his *personal property*, as well as of his *socage lands*; but it continues, with either sex, only till the ward *has attained the age of fourteen*.

The socage tenure being the tenure by which, since 12 Car. II., c. 24, the great body of the lands in England are holden, this species of guardianship is far the most frequent of all at common law, in respect to infants who *have no father living*.

In Virginia, where, prior to the Revolution, all the lands were granted by the Crown, to be held *in free and*

common-savage, this guardianship was so universal that it was not until 1850 that our statutes ceased to recognize it as still subsisting. It was, however, impossible for it to occur after 1779, when all feudal tenures were abolished (10 Hen. Stat. 64; 2 Min. Insts. 74-75); and upon the adoption of the statute of descents (V. C. 1873, ch. 119, § 1; V. C. 1887, ch. 113, § 2548) to take effect 1st January, 1787, there was a further reason why it could not exist with us, namely, that by our law of descents there is *no next of kin who cannot by possibility inherit*.

5*. Guardians by Election.

The power of an infant to choose a guardian arises, at common law, only when the infant is *without any other legal guardian of his person and estate*.

This may happen *either before or after* the age of fourteen; but it is apprehended that if under fourteen the infant is not permitted to choose a guardian, but that the court of chancery must appoint him one, at all events to take charge of his *estate*. His *person*, at common law, might be, if he were an *heir apparent*, under his guardian *by nature*, or if not an heir apparent, under a guardian *for nurture*. (1 Bl. Com. 463; Bac. Abr. Infancy, (A.); 1 Th. Co. Lit. 157, n. (6), 168.)

The election of a guardian is, in England, often made before a *judge on the circuit*, and Mr. Hargrave mentions an instance of Lord Baltimore, at the age of eighteen, making the election of a guardian for some purpose connected with his proprietary government of Maryland, *by deed*, upon the advice of two eminent barristers. (1 Th. Co. Lit. 157-8, n. (6); 1 Bl. Com. 462, n. (8).)

This guardianship must be considered as of common law origin, because it arises out of no statute; and yet its existence appears to date *from a comparatively recent period*. It is noticed by no writer except Swinburne, in his Treatise on Testaments, before Lord Coke, and by the latter it is apparently not recognized as strictly legal. (1 Bl. Com. 462, n. (8); 1 Th. Co. Lit. 157, n. (6), 168.)

This guardianship embraces *the property as well as the person* of the ward, and continues until twenty-one.

Guardianship by election exists in Virginia: that is, a minor, *over the age of fourteen*, may nominate his guardian to the circuit, county, or corporation court, either personally or in writing, acknowledged before a justice. But if the court does not approve the nomination, it may appoint some one else; and by parity of reason, the ward, upon attaining the age of fourteen, cannot cause a guardian previously appointed to be removed merely by his volition, but only for good cause shown. (V. C. 1873, ch. 123, § 4; V. C. 1887, ch. 116, § 2600; Ham v. Ham, 15 Grat. 75 &

seq.) The wardship results, therefore, not so much from the election of the infant as from the *appointment by the court*, so that this sort of guardian may be considered with us as identical with that *appointed by the chancery court*, which is to be next described.

6^g. Guardians Appointed by the *Chancery Court*.

How the court of chancery in England acquired this branch of its jurisdiction is not agreed amongst English lawyers, although that it exercises it without dispute is a matter of daily experience. Mr. Hargrave insists that, although unquestionable even in his day, it was yet at first an *usurpation*, originating about the year 1696, and having no better excuse than that the case was not sufficiently provided for otherwise. The king is admitted, as *parens patriæ* and the universal protector of his subjects, to be entitled to the supreme guardianship of all infants, even though they may have other guardians, or although the parents be living; and it is said that the chancellor exercises this portion of the royal functions by delegation from the Crown. Indeed, it is a general maxim, as we have seen, that the court of chancery possesses a general power to intervene in behalf of such persons as are unable to protect themselves. (1 Bl. Com. 462, n. (8); 1 Th. Co. Lit. 158, n. (6); 2 Stor. Eq. §§ 1351, 1333; Fonbl. Eq. B. II., Pt. II., c. 2, § 1, n. (a); *Eyre v. Countess of Shrewsbury*, 2 P. Wms. 123-4; *Durrett v. Davis*, 24 Grat. 302.)

The wardship in this case embraces *both person and property*, and continues until the *age of twenty-one*.

In Virginia, the power to appoint guardians is explicitly conferred, by statute, upon the *circuit, county and corporation courts*, and, as it is understood, in their capacity as *courts of chancery*. (*Ficklin v. Ficklin*, 2 Va. Cas. 204.) "The circuit, county, and corporation courts," says the statute (V. C. 1873, ch. 123, §§ 3, 4; V. C. 1887, ch. 116, §§ 2599, 2600), "of any county or corporation in which *any minor resides*, or if he be resident out of the State, in which *he has any estate*, may appoint a guardian for him, unless he have a guardian appointed by his father." "If the minor is under the age of fourteen years, the court may nominate and appoint his guardian; if he is above that age, he may, in the presence of the court, or *in writing*, acknowledged before a justice, nominate his own guardian, who, *if approved by the court*, shall be appointed accordingly; and if the guardian nominated by such minor shall not be appointed by the court, or if the minor shall reside without the State, or if, after being summoned by the court, he shall neglect to nominate a suitable person, the court may *nominate and appoint* the guardian in the same manner as if the minor was under

the age of fourteen years." But let it be observed, that the appointment thus of a guardian by the chancery court does not prejudice the right of the father, as guardian *by nature*, to the custody of the ward, and the care of his education; nor if the father be dead, does it prejudice the like claim on the part of the mother, as long as she continues unmarried and is fit for the trust. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603.)

The statute does not in so many words declare just here that the courts above named exercise the function of appointing a guardian in their capacity as *courts of chancery*, but it has been so decided judicially (*Ficklin v. Ficklin*, 2 Va. Cas. 204; *Durrett v. Davis*, 24 Grat. 302); and in that capacity *expressly* they are empowered (V. C. 1873, ch. 123, § 13; V. C. 1887, ch. 116, § 2609,) to "hear and determine all matters between guardians and their wards, require settlements of the guardianship accounts, remove any guardian for neglect or breach of trust, and appoint another in his stead, and make any orders for the *custody and tuition of an infant*, and the management and preservation of his estate." (See V. C. 1873, ch. 123, § 13; V. C. 1887, ch. 116, § 2609.)

Mention is often made in the English books of what are called "Wards of the Courts of Chancery." They are minors who, either by petition direct, or in the course of litigation touching their estates, are taken under the *immediate and special* protection of the court, which either appoints a guardian for the minor, or imposes upon an existing guardian such terms as in its discretion may seem fit. To marry, or to be concerned in bringing about the marriage, of an infant ward of court without its consent, is a contempt which is visited with highly penal consequences, including sequestration of the party's property, imprisonment, etc. (Bac. Abr. Guardian, (C.); 1 Tuck. Com. (B. I.) 141.) A settlement on the wife, of her own fortune at least, or part of it, and if the husband is possessed of an estate, of part of his, is invariably required, regard being had to the circumstances of aggravation or extenuation which mark the particular case. (*Stevens v. Savage*, 1 Ves. Jr. 154, and n. (1); *Stackpole v. Beaumont*, 3 Ves. Jr. 48, and n. (2); *Bathurst v. Murray*, 8 Ves. 64, and notes; *Nicholas v. Squire*, 16 Ves. 260, and n. (2).)

The doctrines of the English chancery touching this subject have not as yet been practically applied in Virginia; and it is not easy to determine in advance whether, when occasion arises, they will be adopted entire or with modification. It may be conjectured, that as marriage settlements are not frequent with us, and as our *Married*

Woman's Law secures her own property to the wife in all cases, there will be less disposition than in England to compel the husband to settle a part of his estate upon the wife.

7^g Guardians by Appointment of the Ecclesiastical Court.

The cases in which the ecclesiastical courts in England may appoint guardians, or whether they can legally appoint them at all, and the extent of the guardian's authority, are so ill-defined that it is needless to do more than to mention the guardianship as one supposed sometimes to exist in England. To this class of guardians belong those mentioned by Blackstone, as assigned by the *ordinary* (the judge of the *bishop's court*), in default of father and mother. (1 Bl. Com. 461; 1 Th. Co. Lit. 159, n. (6).)

As we have no ecclesiastical courts in Virginia, of course there can be no such guardianship here.

8^g. Guardians under the Statute 4 & 5 Ph. & Mary, c. 8.

The *direct object* of the statute 4 & 5 Ph. & M. c. 8, was to punish and prevent the taking away and marrying of maidens under sixteen years of age, without consent of their parents, or of the persons to whom the father had temporarily committed them. But the statute prohibited the act in terms which *implied* that the *custody and education* of such females belonged to the *father and mother*, or to the *person appointed by the father*. And accordingly it is construed to constitute the individuals thus contemplated the guardians *of the persons* (but *not of the estates*) of females *under sixteen*, even, it is said, though they be *natural children*. (1 Bl. Com. 461; 1 Th. Co. Lit. 156, n. (4).)

We have in Virginia a statute of nearly corresponding import to that of 4 & 5 Ph. & Mary, c. 8 (V. C. 1873, ch. 187, § 17; Id. ch. 188, § 18; V. C. 1887, ch. 180, §§ 3678, 3679; Id. ch. 181, § 3713); but with us there is no occasion for the inference drawn by the English courts, because parents are here guardians *by nature of all their children* until the age of twenty-one years. See 1 Tuck. Com. (B. I.) 138.

9^g. Guardians Appointed by Fathers, or *Testamentary Guardians*.

When, upon the restoration of Charles II. to the throne, in 1660, it was determined to abolish the *chivalry* or *knight service* tenure of lands, with its oppressive incidents, and amongst the rest, *guardianship in chivalry*, it was deemed necessary to substitute some other wardship in room of that to be abolished, continuing it until the minor should attain his full age of twenty-one years, and causing it to apply as well to property as to person. Accordingly, the Statute 12 Car. II., c. 24, which took away

the chivalry tenure and its incident of wardship, enabled a father, by *deed or will*, to appoint who should be guardian of his infant children. The *father* was allowed by the statute to exercise this power, though he himself were under twenty-one; to apply it to all his children under twenty-one, or unmarried at his decease, or *born after*; to appoint whom he pleased, except a popish recusant; to make the appointment to take effect in possession or remainder, and to last until the ward was twenty-one or for any less time; and the appointment was declared to be effectual against all claiming as guardians in socage or otherwise, and to clothe the guardian so appointed with the custody and control of *both the person and property* of the ward. (1 Bl. Com. 462, and n. (7); 1 Th. Co. Lit. 156 '7, n. (5); Bac. Abr. Guardian, (A.) 3.)

The statute of Virginia corresponding to 12 Car. II., c. 24, is very like it in its import and effect. It enacts (V. C. 1873, ch. 123, § 1; V. C. 1887, ch. 116, § 2597), that "every *father* may, by his *last will and testament* (but not *by deed*), appoint a guardian for his child, born or to be born, and for such times during its infancy as he shall direct." See Kevan v. Waller, 11 Leigh, 428, &c.

The guardian cannot assign his interest, because it is coupled with a personal trust and confidence in the guardian himself; and for a like reason it is not transmitted to his personal representative. However, if two or more are made guardians, and one of them dies or declines to qualify, the *trust survives*, not merely for the technical reason that it is coupled *with an interest*, but also because it is expedient for infant wards that that construction should be adopted. In order to constitute a testamentary guardian, no particular form of words is prescribed, but the language must clearly indicate such to be the testator's intent. Thus, a devise to one in trust for a child's *maintenance and education* does not constitute the trustee a testamentary guardian; neither does a request that a designated person shall *direct the child's education*; nor a provision that the executor shall invest certain funds, and that the child, out of the proceeds, shall be *educated in the best manner under the direction of the executor*. (Bac. Abr. Guard'n, (A.) 3; Eyre v. Countess of Shaftsbury, 2 P. Wms. 104, 107 '8; Beaufort v. Berty, 1 P. Wms. 702; Kevan v. Waller, 11 Leigh, 428, &c.; Gaines v. Spann's Ex'ors, 2 Brock. 88.)

With us, the appointment by the father of a testamentary guardian does not supersede the mother's right as guardian *by nature* to the custody of the child's person and the care of his education while she remains unmarried

and is fit for the trust. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603; *Mellish v. DeCosta*, 3 Atk. 14.)

Natural children are not within this statute. The putative father of a bastard cannot by his will appoint a guardian for him; but except as against *the mother*, the court of chancery will adopt the father's nomination, unless it appear that some objection exists to the person named. (Bac. Abr. Guard'n, (A.) 3.)

A *mother* is not empowered by this statute to appoint a guardian, and consequently her appointment is void. So, also, for the same reason, is an appointment *by a grandfather* as to the grandchild; although in either case, if the infant be left an estate on condition that the person named as guardian be allowed to act as such, if the father refuse to assent to it, it works a forfeiture of the subject devised. (Bac. Abr. Guard'n (A.) 3; *Ex parte*, Edwards, 3 Atk. 519; 1 Th. Co. Lit. 157, n. (5).)

10^g. Guardians by the Custom of Particular Places.

This species of guardianship is exemplified in England by the custom of the city of London and of the county of Kent. Thus, by the special custom of London, the wardship of *orphans* under age and unmarried belongs to the city; and by the special custom of the county of Kent, the lord of the manor may commit the guardianship of his tenant's *infant heir* to the next relation, in the court of justice within whose jurisdiction the land is, the lord being answerable for the guardian's fidelity.

The nature and extent of this guardianship, as to what age it continues, and whether it embraces the care of the estate as well as the custody of the person, are to be determined by the custom itself. (1 Th. Co. Lit. 157 n. (6); Bac. Abr. Guard'n, (A.) 2; *Id.* Custom of London, (B.).)

In Virginia there can be no special custom of particular places (that is, in the sense of a *local law*), for a reason which has been stated (*Ante*, Vol. I., p. 38), and, therefore, there cannot be with us such a guardianship as this. (*Harris v. Carson*, 7 Leigh, 632; *Mason v. Moyers*, 2 Rob. 606.)

11^g. Guardians *ad Litem*.

A guardian *ad litem* is one appointed for an infant to defend him in any action or suit brought against him. In all *civil actions or suits* every court, where an infant is sued, has power to appoint a guardian *ad litem* to conduct his defence in that case, the appointment having to be renewed in every separate case, the infant having no discretion to select an attorney to represent him. And so necessary is the appointment of a guardian *ad litem* esteemed, that although the process against an infant is issued and executed against him just as against an adult, and the

declaration or bill setting forth the complaint is framed and filed in like manner, yet after the declaration or bill is filed, no rule or any proceeding whatever can be had *lawfully* until a guardian is designated; and any step that is taken will be voidable as to the infant. However, if an infant be fully defended by his testamentary or regularly appointed guardian, the acquiescence of the court is equivalent to the appointment of such person as guardian *ad litem*.

In *criminal* proceedings infants defend like adults, and it is error for a minor to plead to a criminal prosecution by a guardian *ad litem*. He ought to appear and make defence like an adult, either in person or by attorney. (Word's Case, 2 Leigh, 653.)

But whilst it is error *in a civil case* for a minor to appear by attorney, yet in the interest of the minor himself, it is in Virginia provided by statute (V. C. 1873, ch. 177, § 3; V. C. 1887, ch. 169, § 3449,) that "no judgment or decree shall be stayed or reversed for the appearance of either party, being an infant under the age of twenty-one years, by attorney, if the verdict (where there is one), or the judgment or decree, be for him, and *not to his prejudice*." See 1 Th. Co. Lit. 159, n. (6); 171, n. (29); 1 Rob. Pr. (1st ed.) 172-'3; Bac. Abr. Guard'n, (A.) 4; Fox & al. v. Cosby, 2 Call, 1; Roberts v. Stanton, 2 Munf. 129; Brown v. McRae's Ex'ors, 4 Munf. 429; Beverlys v. Miller, 6 Munf. 99; Word's Case, 3 Leigh, 743.

Where there is no such guardian, any judgment or decree against the minor may be reversed and annulled by the same court which pronounced it, at common law, upon a writ of error *coram vobis*, and in Virginia on *motion* simply, after reasonable notice. (V. C. 1873, ch. 177, § 1; V. C. 1887, ch. 169, § 3447; Watts v. Cole, 2 Leigh, 653; Bac Abr. Infancy, (K.) 2.)

It has been questioned whether at common law a guardian *ad litem* can be *compelled to serve*. In Virginia this doubt was formerly resolved by a statute (V. C. 1873, ch. 167, § 17), which expressly declares that "the court in which any suit is pending, or the clerk *at rules*, may appoint a guardian *ad litem* to any infant or insane defendant, whether such defendant has been served with process or not. The court *may compel* the person so appointed to act, but he shall not be liable for costs, and shall be allowed his reasonable charges, which the party on whose motion he was appointed (who is usually the plaintiff) shall pay." (Wells' Heirs v. Winfree, 2 Munf. 342.) But the Code of 1887 does not allow the courts to compel the guardians *ad litem* to serve. It requires also that the guardian shall be "a discreet and competent *attorney at law*," or if

no such attorney is willing to act, then some other "*discreet and proper person*." And the statute prescribes that the guardian *ad litem* shall not be liable for costs. (V. C. 1887, ch. 159, § 3255.)

As to the powers and duties of guardians *ad litem*, they are confined to the defence of the suit in which the guardian is appointed. And even in that suit, it is a settled rule that no answer or admission of his shall prejudice the infant, or be proved against him for any purpose. (Bac. Abr. Guardian, (A.) 4; Bank of Alexandria v. Patton, 1 Rob. 500, 535.)

2^d. The Circumstances under which the Several Kinds of Wardship Occur.

It appears from the foregoing account of the several species of guardians that of *the eleven* existing in England, we have in Virginia *only five*, viz:

- 1, Guardians by nature;
- 2, " by election;
- 3, " by appointment of the chancery court;
- 4, " by the father's will; and
- 5, " *ad litem*;

and that of these five *three* are charged with the *care of the ward's estate*, and give *bond and security* accordingly, viz:

- 1, Guardian by election;
- 2, " by appointment of chancery court; and
- 3, " by father's will;

it being provided that if in either of these cases the court shall omit to require a bond before the guardian is allowed to qualify (unless, in case of a *testamentary guardian*, the will shall so direct), or if it accept as sureties such persons as do not satisfy it of their sufficiency, the judge is himself liable to the infant for any loss ensuing; and until such bond is given, a temporary guardian, under the name of *curator*, may be designated by the court, who may be permitted to qualify, in the discretion of the court, without security. (V. C. 1873, ch. 123, §§ 2, 5, 6; Id. ch. 12, § 6; (V. C. 1887, ch. 116, §§ 2598, 2601, 2602; Id. ch. 13, § 177.)

Let us now see when one or the other of these several kinds of guardianship occurs.

If there be a *father*, he is guardian by *nature*, and as such is charged with the custody of the *child's person*, and with his *education*, but not *with his estate*, which can only be committed to such parent, or to some other person, by virtue of an *appointment as guardian by the court*, and giving bond, etc. He may, on the other hand, be deprived by a *court of chancery*, in its discretion, even of the custody of the child's person, if he shall seem *grossly unfit* for it. (Bac. Abr. Guardian, (C.); 2 Stor. Eq. §§ 1341 & seq.; V. C.

1873, ch. 123, § 13; V. C. 1887, ch. 116, §§ 2609 to 2613; *Ante*, pp. 428-9, 452.)

If the father be dead, the mother succeeds, as guardian *by nature*, to the care of the *infant's person*, and the conduct of his *education*; and she thus succeeds, notwithstanding there be a guardian by the father's will, or by appointment of the chancery court, while she remains unmarried, and is fit for the trust. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603; *Armstrong v. Stone & ux.* 9 Grat. 105-107.) And in the absence of a testamentary or chancery guardian, the mother's guardianship *by nature* prevails, although she be married again. (*Villa Real v. Mellish*, 2 Swanst. 533; *Pottinger v. Wrightman*, 3 Meriv. 67, 79; *Armstrong v. Stone & ux.* 9 Grat. 105.)

A testamentary guardian, and a guardian elected by the ward, or appointed by the court, are entitled generally to the care of the *ward's person and estate*; but the father and mother are, for the most part, not thereby divested of their parental control. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603.)

The wardship may be terminated before the minor attains his age of twenty-one years, by the guardian's death; by his resignation (with consent of the court which appointed him); by his removal by the court of chancery, (and such removal may be effected not only by an express order, but also by the appointment of a new guardian in the room of a former one), for neglect or breach of trust; or in case of a testamentary guardian, by the lapse of the period assigned in the will for its duration. But the ward is not at liberty (as has been sometimes thought), after the age of fourteen, to change at pleasure even a guardian previously nominated by himself, and *a fortiori* not one designated by his father's will, etc. Good cause must exist for the change, in order to justify it, and courts ought by no means to be indulgent in hearkening to such applications. (*Bac. Abr. Guardian*, (E.); *Bradshaw v. Bradshaw*, 1 Russ. (1 Eng. Ch.) 528; *Newell's case*, 1 Johns. C. R. 25; *Walker v. Walker*, 2 Wash. 200; *Ham v. Ham*, 15 Grat. 74; V. C. 1873, ch. 123, §§ 7, 13; V. C. 1887, ch. 116, §§ 2603, 2604.)

It is difficult to define the precise degree of *neglect*, or the exact character of the *breach of trust*, which will warrant or require the removal of a guardian by the court. But it may be said with confidence that such removal is proper in all cases where by his *neglect*, and still more where by his *breach of trust*, he has prejudiced or endangered the interests committed to him; as where he has employed the funds rather with a view to his own advantage than that of the ward, or where he has evinced an indispo-

sition or a slowness to guard and defend the latter's rights. (Reynolds v. Link, 27 Grat. 31; Snavelly v. Harkrader, 29 Grat. 128.) And the discretion to interfere having been specially confided to the chancery court, an appellate court can properly control such discretion only where *it is plain* that it has been erroneously exercised. (S. Cases.)

If the guardian does not die nor resign, and is not previously duly removed by the court, or in case of the testamentary guardian, if the period named in the will does not expire first, his office terminates (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603) as to *male wards* at twenty-one, and as to *female wards* at twenty-one or marriage. This statutory provision in respect to *female wards* is merely declaratory of the common law, which holds marriage to put an end to the guardianship, and (independently of the married woman's law) to transfer to the husband, if adult, and if not, to the husband's guardian, the care of her estate, and to the husband *in all cases* the custody of her person. The married woman's law provides that "where the wife is a minor entitled to any estate under the law, she shall not have the management of it during her minority (except that she may take to her own use, the product of her *personal labor*); but the circuit or corporation court of the county or corporation where she resides, or where the estate or any part of it is, shall on the petition of her *next friend*, commit such estate to a *receiver*, who shall give bond with security before the court or judge, to manage the estate during her minority, and apply the proceeds as the court may order, to her separate use during coverture, and while she is a minor, and upon her attaining her age, or dying, to pay and deliver what remains to her, or to those entitled thereto. (V. C. 1887, ch. 103, §§ 2291, 2292.) As to *male wards*, the common law holds marriage to emancipate the person, but still to leave the estate, including that of the wife, in the care of the husband's guardian. And this probably will be the construction of the statute above cited (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603), touching the termination of the wardship, since it is hardly compatible with the relation of husband and wife that the *husband's person* should be subject to the control of another. (Ross v. Gill, 4 Call, 250; Guerrant v. Hooker, 7 Leigh, 366; Armstrong v. Walkup, 12 Grat. 610; Mendez v. Mendez, 1 Ves. Sr. 91; Roach v. Garvan, Id. 159-60; Reeve's Dom. Rel. 328; Bac. Abr. Guardian, (E.); 2 Kent's Com. 225; Eyre v. Countess of Shaftsbury, 2 P. Wms., 123; Ware v. Ware, 28 Grat. 670, 674.)

When a guardian is removed by the circuit, county, or corporation court in chancery, to which courts power is expressly committed to "remove any guardian for neglect

or breach of trust, and to appoint another in his stead" (V. C. 1873, ch. 123, § 13; Id. ch. 128, §§ 18, 19; V. C. 1887, ch. 116, § 2609; Id. ch. 121, §§ 2687, 2688); notice must have been given to the guardian of the intended proceeding, and he must have been summoned and had an opportunity to show cause against it (*Bank of Virginia v. Craig*, 6 Leigh, 437); which is only an application of an universal principle, that *no one shall be condemned unheard*; a principle, as a great jurist has observed, "not founded in book learning, but engraved upon the heart" (Ld. Camden, in *Shipley's Case*, 5 Campb. Lives of Chan'rs, 289; Acts xxv. 16; John vii. 51); and fully recognized in the American courts, which justly hold that a citation before hearing, and hearing, or opportunity of being heard, before judgment, are essential to the security of *all private rights*. (*Bradley v. Fisher*, 7 Wal. 354; *Ex parte Bradley*, 7 Wal. 364; *Ex parte Robinson*, 19 Wal. 513-14; *Post*, p. 555; 4 Min. Insts. 170.)

It should be observed, that the authority of a guardian (except of a guardian *by nature*, if, indeed, that be an exception) extends not, by the common law, beyond the jurisdiction under which he received his authority, although many of the continental jurists hold otherwise. It is settled, however, that a Virginia guardian has, in general, no authority outside of Virginia, nor has a guardian appointed in England, Canada, or Mississippi, any power in Virginia. (Stor. Conf. L. §§ 495, &c., 504, 504 a, &c.) However, this principle has proved so inconvenient in practice as to lead to the enactment in Virginia of a statute which provides that where any minor (and the same principle is applied in the case of *insane persons* and of beneficiaries *in trusts*) entitled to money or property in this State, resides out of it, on the petition of a guardian of such minor, lawfully appointed and qualified in the *State or country* of his residence, the circuit or corporation court of the county or corporation in which the estate may be, may order the delivery of such personal property, etc., to the foreign guardian or committee, including the accruing rents of his real estate, to be removed to the State or country where he qualified, with certain precautions against abuse and against prejudice to the interest of the minor. (V. C. 1873, ch. 125, §§ 3 to 5, 8, 9; Id. ch. 154, §§ 7, 38; V. C. 1887, ch. 118, §§ 2629 to 2635.)

3^d. The Powers and Duties of Guardians.

The fundamental principle touching this subject is that the guardian's office is one of obligation and duty for the benefit of the ward, and not of speculation and profit for his own aggrandizement. He cannot *lawfully* reap any advantage from the use of the ward's money. He cannot lawfully act for his own emolument in any contract, or pur-

chase, or sale, as to the ward's property; but in all that he does the law obliges him to consult the ward's interest alone, and whatever profits arise from transactions with or concerning the minor's estate, redound in law to the minor and not to the guardian. (2 Kent's Com. 229; Bac. Abr. Guardian, (G).)

The powers and duties of guardian are summed up in two particulars, namely, (1), The *custody of the ward's person* and care of his education; and (2), The *care and management of his estate*;

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1st. The Custody of the Ward's Person and Care of his Education; W. C.

1^h. *Right to the Custody of the Ward's Person and the Care of his Education.*

In these particulars the power and reciprocal duty of guardian and ward are very *similar* to those prevailing between *parent and child*; but they are not exactly the *same*; for a guardian, as he can do nothing but for the benefit of the infant, so he has no private interest as a parent, or at least as a father has, in his ward's services and earnings. He cannot recover for such services, nor can he maintain an action *in his own name* for the seduction of a female ward, nor for any injury to the ward's person. But see Bac. Abr. Guardian, (F.); Fernsler v. Moyer, 3 Watts & Serg. (Pa.) 416.

The guardian's right to the custody of the ward's person is undeniable, as it is also to the care of his education, in respect to which a court of chancery will assist him, if need be, with all its powers. (2 Stor. Eq. § 1340; Hill v. Turner, 1 Atk. 516; Hall v. Hall, 3 Atk. 721; Tremain's Case, 1 Stra. 167; *Ante*, p. 435.) And this authority, at least in guardians appointed by the court and by the father's will, and in the father and mother as guardians *by nature*, is pretty distinctly recognized with us by statute. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603.)

It is the duty of a guardian to protect and defend his ward, and he is justified in assisting him to obtain redress for any wrong done him. He is also required to provide, out of the *profits* of the ward's estate (and sometimes out of the *principal*), for his maintenance and education; and when his estate is not sufficient for this purpose, it is the guardian's duty, if the ward's age and health admit, and a suitable person will take him, to *bind the ward apprentice*, with the consent of the court of the county or corporation, if the child be under fourteen, and if over fourteen, with his own consent; or, with like consent, to place him in some incorporated asylum for destitute chil-

dren. But the guardian is in no case *personally* responsible for his ward's support and education, unless by agreement. (V. C. 1873, ch. 123, §§ 7, 8; Id. ch. 122, §§ 1, 2; V. C. 1887, ch. 116, §§ 2603, 2604; Id. ch. 115, §§ 2581, 2582; Barnum v. Frost's Adm'r, 17 Grat. 398.) It is the guardian's duty also to control that most important interest of the ward, *his marriage*, no license therefor being obtainable without his consent. (V. C. 1873, ch. 104, § 3; V. C. 1887, ch. 100, § 2218.) And, therefore, a guardian is justified in stopping his ward's elopement, and detaining his clothes if he has eloped. (1 Bl. Com. 463, n. (9); Barker v. Taylor, 1 Carr & P. (11 E. C. L.) 101.)

As to the removal of the ward from the country by his guardian, it is not necessarily inadmissible, if it seem to have been dictated by no bad motive, nor likely to be attended with ill consequences; but the act is regarded with jealousy and distrust by a court of equity, and not a little quickens the disposition of the court to intervene and to exert its extraordinary power of taking the infant from the custody of the guardian altogether. And on the other hand, *in no case whatever* will the court make an order for taking an infant out of its jurisdiction. (2 Stor. Eq. § 1339; 2 Kent's Com. 220, n. (d); Creuze v. Hunter, 2 Bro. C. C. 500, *note*; De Manneville v. De Manneville, 10 Ves. 52; Mountstuart v. Mountstuart, 6 Ves. 363; People v. Mercein, 8 Pai. (N. Y.) 47.)

2^b. Remedies for the Abduction of the Ward.

The only injury which a guardian can personally suffer in his *tutorial capacity or relation*, is by the *abduction* of his ward. For this wrong the law affords *five remedies*, four of which are the same as in case of a parent similarly aggrieved, which having been already explained, will be merely stated, along with their general effect respectively;

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1ⁱ. Action of Trespass *vi et Armis*, or in Virginia, of Trespass on the Case.

This action is adapted to recover *damages* for the wrong, but not to regain possession of the *person* of the ward. (1 Bl. Com. 463, n. (9); Bac. Abr. Guardian, (F.); Hussey's Case, 9 Co. 72 a; Rex v. Smith, 2 Stra. 982.) And in Virginia, by statute in any case in which an action of trespass will lie, there may be maintained an action of trespass *on the case*. (V. C. 1873, ch. 145, § 6; V. C. 1887, ch. 137, § 2901.)

2ⁱ. Writ *de Custodia Terra et Heredis*.

This is denominated the *writ of right of ward*, and lay, at common law, for a guardian *in chivalry* and *in socage*.

Thereby the guardian recovered the custody of the ward's body, and of *his lands*; but if, meanwhile, the ward had been married, the body was not recoverable, and this writ lay not; the guardian being then driven to the action of trespass, wherein he recovered, besides other damages, the *value of the marriage*. This, however, was remedied by Stat. of Merton, 20 Hen. III. c. 6, which restored the benefit of the writ of right of ward. (1 Th. Co. Lit. 338, and n. (C.); 3 Bl. Com. 141; Bac. Abr. Guard'n, (F).)

As we have no tenures in Virginia, either chivalry or socage, this remedy is supposed not to exist here.

3^d. Writ of *Ravishment of Ward*.

By this writ, given by Stat. Westm. II., 13 Edw. I. c. 35, the guardian recovered the *body of the ward*, together with damages for the taking and detention, and not *damages only*, as by the action of trespass at common law. The benefit of the statute is not restricted to any particular class of guardians, and it may be employed certainly, not only by guardians *in socage*, but also by testamentary guardians, and guardians *by nature*. (1 Th. Co. Lit. 338; Bac. Abr. Guardian, (F).; 1 Bl. Com. 463, n. (9); 3 Bl. Com. 141; Hussey's Case, 9 Co. 72, 74 b; Eyre v. Countess of Shaftsbury, 2 P. Wms. 122.)

The writ of *ravishment of ward* being a *remedial writ*, granted by a *general statute* of England, prior to 4 Jac. I., and not repealed in Virginia, is reserved for the use of our people, although practically it is not employed. (V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3.)

4th. Writ of *Habeas Corpus*.

This writ is adapted to *recover* a ward only when it is too young to exercise *any will* as to the person in whose custody it would be. In that case, as the custody of one who has no right to it is illegal, and the child has no discretion to express any consent, the writ of *habeas corpus* is adapted to liberate him from that wrongful custody, and the court then is obliged to determine whose is the rightful possession, because that of anybody else would be *illegal confinement without consent of the party*. But it will be observed, that if the ward have attained the age of consent (which is probably fourteen), and is detained under an allegation of wardship *against his will*, the writ of *habeas corpus* is still adapted to *liberate him*, but not to *restore* him to his rightful guardian. The writ will simply discharge him, and leave him at liberty to go whither and with whom he pleases. (Rex v. Clarkson, 1 Stra. 449; Rex v. Smith, 2 Stra. 982; R. v. Delaval, 3 Burr. 1434; *Ex parte*, Pearson, 4 J. B. Moore, (16 E. C. L.) 366; Skinner's Case, 9 Do. (17 E. C. L.) 278;

King v. Greenhill, 4 Ad. & El. (31 E. C. L.) 624; King v. Isley & ux. 5 Ad. & El. (31 E. C. L.) 441; *In re* Hakeswell, 12 Com. B. (74 E. C. L.) 223; *Ex parte* Witte, 13 Com. B. (76 E. C. L.) 680; Armstrong v. Stone & ux. 9 Grat. 102.)

5. Bill in Chancery.

The bill in chancery is the most usual, direct and eligible remedy whereby to try the right of wardship. (2 Stor. Eq. § 1340; De Manneville v. De Manneville, 10 Ves. 52; *Ex parte* Skinner, 9 J. B. Moore, 278; People v. Chegray, 18 Wend. 637; Armstrong v. Stone & ux. 9 Grat. 105-6.)

2^g. The Care and Management of the Ward's Estate.

The possession, care, and management of the ward's estate, real and personal, are confided to three classes of guardians, as we have seen, namely: the guardian *by election*, the guardian *by appointment of the chancery court*, and the guardian *by the father's will*; and at the expiration of his trust, such guardian is to deliver it all to those entitled, and to account for the profits.

In consequence of his *right to the possession*, he may and ought to sue in *his own name* for any trespass or injury done to the ward's property, although whatever damages he may recover he must account for to the ward. He may, indeed, in an action for ejectment (which theoretically is an action of *trespass*), recover the possession of the ward's lands from the *ward himself*, against whom also he may, as guardian, justify his possession. On the other hand, the ward (not being entitled *to the possession*) can maintain no action of trespass for any trespass committed on his lands or other property; but all such wrongs must be compensated to him by the guardian who might and ought to have recovered therefor. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603; 2 Kent's Com. 228; 2 Stor. Eq. §§ 1356, &c.; Truss v. Old, 6 Rand. 559-60; Lemon v. Harnsbarger, 6 Grat. 301; Sillings v. Bumgardner, 9 Grat. 273; Eyre v. Shaftsbury, 2 P. Wms. 122.) But whilst the guardian is thus, by virtue of his possession, to sue in his own name for trespasses committed on the ward's lands or other property, a second guardian is not to undertake to sue in his own name to call a former guardian to account for his transactions as such guardian; but the bill ought to be filed in the name of the ward by his *next friend*, who may be the guardian for the time being, but may also be any other person approved by the court. And so, in order to get possession at first of the ward's estate, if a suit be needful, it should be not in the name of the guardian, but of the infant by his next friend. (Lemon v. Harnsbarger, 6 Grat. 301; Sillings v. Bumgardner, 9 Grat. 273.)

In managing the ward's property the guardian's discretion is pretty large, always subject to his accountability, of course.

He may not, indeed, sell *the lands*, save in pursuance of statute, by proceedings in the *circuit or corporation court* in chancery, when the court shall be satisfied by impartial testimony that the interest of the ward will be promoted by such sale; in which case the proceeds are to be invested under the direction of the court, and so much thereof as to which he may remain at his death *intestate*, shall, if he continue till his death *incapable of making a will*, pass to those who would have been entitled to the land if it had not been sold. (V. C. 1873, ch. 124, §§ 2 to 7, 9, 10, 12; V. C. 1887, ch. 117, §§ 2598 to 2603, 2605, 2606, 2608; 1 Tuck. Com. (B. I.) 142-'3; 2 Kent's Com. 228; Field v. Schieffelin, 7 Johns. C. R. 150; Garland v. Loving, 1 Rand. 396; Talley v. Starke, 6 Grat. 339; Cooper v. Hepburn, 15 Grat. 551; Faulkner v. Davis, 18 Grat. 675; Vaughan v. Jones, 23 Grat. 444.) And although it is expressly enacted that "at such sale the guardian, or guardian *ad litem*, or committee, or trustee,"—being the persons charged with the protection of the infant's interests,—"shall not be a purchaser, directly or indirectly. (V. C. 1873, ch. 124, § 7; V. C. 1887, ch. 117, § 2621), yet it is to be observed that that provision was made for the benefit and protection of the infant (and other disabled persons to whom, as well as to infants, the statute relates), and not for the advantage of the guardian, or other fiduciary, himself. Hence, where the guardian became the purchaser at such a sale, and the lands greatly depreciated afterwards, the sureties in his official bond were held liable to the ward for the purchase-money unpaid. (Redd v. Jones, 30 Grat. 126, 128.)

But although the guardian may not *sell* the lands, save in the manner prescribed, he may *make a lease* of them, to continue *during the wardship*, and may reserve the rent payable either to himself or to the ward; and he may dispose of the *annual proceeds* at his discretion, whether he leases or cultivates them himself, accounting for whatever he does or ought to receive. (1 Bl. Com. 463, n. (9); 2 Lom. Dig. 124; Ross v. Gill & ux. 1 Wash. 90; Genet v. Talmadge, 1 Johns. C. R. 5; Ross v. Gill, 4 Call, 250; Roe v. Hodgson, 2 Wils. 135; Bac. Abr. Leases, (I.) 9; Id. Guardian (G.)) Leases to extend beyond the limits of the wardship are *void*, and are therefore incapable of confirmation by the infant upon coming of age. (2 Min. Insts. (692), 769.)

He is liable for any *waste* done (but *not for waste suffered*) by him on the ward's lands; and if the waste be *wanton*, he must pay *treble damages* therefor (V. C. 1873,

ch. 133, §§ 3, 4; V. C. 1887, ch. 126, §§ 2777, 2778; for which, if suit be brought by the infant during *minority*, it ought to be brought, like all other suits during that period, through his *next friend*. (Eyre v. Shaftsbury, 2 P. Wms. 119; Lemon v. Harnsburger, 6 Grat. 301; 1 Bl. Com. 163, n. (9); 1 Rob. Pr. (1st ed.) 501; V. C. 1887, ch. 116, § 2614.)

As to the ward's *personal estate*, the guardian has authority to sell any part or the whole of that (subject to his accountability), whether it be perishable or not, and will confer a good title on the purchaser, unless the sale be *fraudulent*, and the purchaser *collude with the guardian* by co-operating in the fraud,—a principle which holds in dealings with all fiduciaries. (Dodson v. Simpson, 2 Rand. 294; Truss v. Old, 6 Rand. 588; Broadus v. Rosson, 3 Leigh, 12; Bank of Va. v. Craig, 6 Leigh, 399; Field v. Schieffelin, 7 Johns. C. R. 152; Fisher v. Bassett, 9 Leigh, 119; Pinckard v. Woods, 8 Grat. 140; Hunter v. Lawrence, 11 Grat. 111.) And it may be observed further, that the guardian's sureties are liable only for so much as he has received in his capacity as guardian, which must be judged of by his acts and contemporaneous declarations. Thus, if the guardian be also executor, in which latter capacity he originally got possession of the property in question, that possession *as executor* is presumed to continue until the contrary appears; and so one or the other set of sureties is made liable accordingly. (2 Rob. Pr. (1st ed.) 377.) And a bond given by the guardian to the ward, although *prima facie* evidence against the sureties, is no satisfaction of the claim, nor discharge of the sureties, unless given and received in satisfaction. (Hamlin's Adm'r v. Atkinson, 6 Rand. 579; Yerby v. Lynch, 3 Grat. 485, 496, 505; Smith v. Blackwell, 31 Grat. 298.)

The guardian must make good to the ward any loss suffered by the latter in consequence of the guardian's receiving payment of a gold debt in a depreciated currency, except under circumstances of overruling necessity. The innocence of the guardian's intentions constitutes no defence; nor does the fact that he derived no profit from the act complained of; nor that he was advised by counsel that it might be safely done. (Crawford v. Shover, 29 Grat. 81; Crickard v. Crickard, 25 Grat. 425; Moss v. Moorman, 24 Grat. 101; Jennings v. Jennings, 22 Grat. 321; Clough v. Bond, 3 My. & Cr. (14 Eng. Ch.) 496; Powell v. Evans, 5 Ves. 843, 845, note, 839, n. (a); *Post*, pp. 477, 478.)

In general, the acts of a guardian, even though without authority, yet if beneficial to the ward, will be protected, whilst so far as they are otherwise they will be avoided; so that, as a general rule, whatever trust arises will follow

the *actual interest of the infant*. (Bac. Abr. Guardian, n. (G.); Millner v. Harewood, 18 Ves. 273-'4.)

Provision is made for the execution of any trust in which an infant may be the trustee, under the direction of a court of chancery. (V. C. 1873, ch. 124, § 1; Id. ch. 174, §§ 1, 4; V. C. 1887, ch. 167, §§ 3397, 3398; 2 Min. Insts. p. 205.)

It has been already observed that it is the duty of the guardian, *out of the income* of the ward's estate, real and personal, to provide for his *maintenance and education*, and in Virginia that principle is expressly sanctioned by statute. (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603.) And on the other hand, his expenditures for the purpose must, in general, be limited to the *annual profits* of the estate, including all belonging to the ward, whether in the hands of the guardian or the personal representative of the father, unless the deed or will under which the ward's claim is derived allows more, which principle also is confirmed by the statute (V. C. 1873, ch. 123, § 8; V. C. 1887, ch. 116, § 2604). And let it be observed, that the surplus of one year not required for disbursements becomes a *part of the principal*, and cannot be employed by the guardian to meet disbursements of subsequent years, except where it is allowable for that purpose to encroach on the principal. (2 Stor. Eq. § 1355; Fonbl. Eq. (B. I.) c. 2, § 1, & n's (d) & (e); Barlow v. Grant, 1 Vern. 255; Bostwick's Case, 4 Johns. C. R. (N. Y.) 103; Hooper v. Royster, 1 Munf. 129, 132; Foreman v. Murray, 7 Leigh, 416, 418; Bennett v. Claiborne & als. 23 Grat. 374.)

In respect to *real estate*, the doctrine of restricting the guardian to *annual profits* for the ward's maintenance and education is believed to *admit of but one, and that a very qualified exception*. The ward's lands may indeed be sold, as we have seen, where his interest requires it, under the direction of the *circuit or corporation court in chancery*, but the proceeds are required to be not expended, but *invested* (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603); and upon the infant's death under age, are to pass (so much as remains unexpended) to his heirs as *real estate*. However, the *circuit court* in chancery (and, as is presumed, the *corporation court* also—Va. Const. 1869, Art. VI., § 14; V. C. 1873, ch. 154, § 38; V. C. 1887, ch. 147, § 3055; Id. ch. 116, § 2609), when it appears to its satisfaction that the proper maintenance and education, or other interests of an infant require that such proceeds beyond the *annual income* should be applied to the use of the infant, may so order; and then as to so much of the proceeds as shall be thus applied, in pursuance of such *previous order*, they shall be deemed *personal estate*, but no further. (V. C. 1873, ch. 123, § 13; V. C. 1887, ch. 116

§ 2609.) And it is expressly enacted (V. C. 1873, ch. 123, § 9; V. C. 1887, ch. 116, § 2605), that whilst the ward's *personal estate* may, in proper cases, be sold by the guardian to pay the balance of expenditures over and above the income of his estate, yet "neither the *ward personally*, nor his *real estate*, shall be liable therefor." (*Rinker v. Streit*, 33 Grat. 667-'8.)

As to *personalty*, however, more indulgence is shown, and disbursements beyond the annual income of the ward's property are allowed in a few cases, but not without an anxious vigilance on the part of the court of equity. Independently of statute, the rule seems to be that the guardian can never, of his own authority, exceed the ward's income, and break in upon the principal, but must obtain the *previous sanction* of the court therefor; that the court will allow it only in extraordinary cases, and is especially averse to permitting it when the ward is old enough to *go to service* or to be *bound apprentice*, and for the purpose of *maintenance* merely, and not of education. He shall not be permitted, as has been well said by an eminent judge, to keep his ward idle and unemployed, and eating up his little patrimony, so that when he comes of age he is turned adrift, penniless, and, what is worse, without a trade or calling to support him, and without habits of industry. Nor will any degree of meritoriousness in the guardian's administration, induce the court *at common law* to sanction an expenditure in excess of income incurred without its own *previous approval*. (2 Stor. Eq. § 1335; *Barlow v. Grant*, 1 Vern. 255; *Walker v. Wetherell*, 6 Ves. 473; *Myers v. Wade*, 6 Rand. 444; *Broadbuss v. Rosson*, 3 Leigh, 12; *Anderson v. Thompson*, 11 Leigh, 439; *Jackson v. Jackson*, 1 Grat. 144.)

The statutes of Virginia have somewhat relaxed this spirit of suspicious jealousy towards guardians. Thus, whilst they declare the *general rule* that no disbursements shall be allowed, where the deed or will under which the estate is derived does not authorize it, beyond the *annual income* of the ward's estate, yet provision is made in express terms for the two following exceptions (V. C. 1873, ch. 123, § 8; V. C. 1887, ch. 116, § 2604); viz.:

First, Where the ward is of *such tender years*, or so *infirm*, that he cannot be bound out as an apprentice, or *no suitable person will take him*; or,

Secondly, Where, although old enough to be bound out as an apprentice, it *shall be deemed best* for the ward that the principal of his personal estate, or a portion thereof, should be applied towards his education and maintenance; and the court shall be satisfied that such expenditure was

actually made, and was *judicious and proper*, and shall allow the same.

This statutory provision, therefore, is little more than the enactment of the principles previously recognized in equity, but with this difference, that the *previous approval* by the court is not required by the statute, as it was at common law, but that it suffices if the court *subsequently ratify the expenditure*, being satisfied that it was *actually made*, and was *judicious and proper*. And accordingly, it is declared that, when any disbursements exceeding the annual profits are allowed, the court may order the ward's *personal property* to be sold in order to meet the excess, or may sanction a sale already made by the guardian. But, as we have seen, neither the ward *personally* nor his *real property* is liable for such disbursements. (V. C. 1873, ch. 123, § 9; V. C. 1887, ch. 116, § 2605; Barton v. Bowen, 27 Grat. 849; Rinker v. Streit, 33 Grat. 667-'8, 673.)

On the other hand, as we have seen, no personal responsibility attaches *by law* to the guardian for the expense of educating and supporting the ward. If he is liable at all, it is in consequence of his own promise, which, like other promises, may be either *express or implied*. But his personal liability on such promise is not obviated by his styling himself *guardian*; nor does his personal responsibility do away with the creditor's right to charge the ward's estate in his hands, unless his personal promise was taken avowedly *in satisfaction* of the demand. (Hamlin v. Anderson, 6 Rand. 579; Barnum v. Frost, 17 Grat. 398.)

4^f. Guardian's Accounts and Allowances.

In discussing the doctrines applicable to the settlement of the accounts of a guardianship we are to have regard to, (1), The general doctrine of the accountability of guardians; (2), The particulars for which a guardian is accountable; (3), The means provided in Virginia to compel the prompt and accurate settlement of guardian's accounts; and (4), The mode of stating guardian's accounts;
W. C.

1^g. General Doctrine of Accountability of Guardians.

Guardians who have charge of *infant's estates* (namely, with us, guardians *by election*, *by appointment of the chancery court*, and *by the father's will*), are accountable for *all profits* which are or ought to have been received, and for *all losses* incurred through the guardian's default. But before this accountability can be exacted there must be satisfactory proof of the party's acting as such or of his appointment and qualification as guardian, especially when it appears that he did not act in that capacity. (Lincoln v. Stern, 23 Grat. 822.)

Before the infant ward attains his age this accounta-

bility may be enforced by a suit by the infant, under the protection of his *prochein ami*, or next friend (but still in the name of the infant); and after he attains his age, by a suit in his own name alone. (*Lemon v. Harnsberger*, 6 Grat. 305; *Villa Real v. Mellish*, 2 Swanst. 537; *Bac. Abr. Infancy*, (K.).)

The infant, indeed, when he has no regularly appointed guardian, has the extraordinary privilege of being allowed to elect whether to regard a stranger who enters upon his lands, either as a *wrong-doer* and disseisor, or as a *guardian*, and as such to constrain him to account for the profits. So, also, where executors or trustees have charge of an infant's estate during minority, whether irregularly or improperly, or in pursuance of the will or deed of one who had power to confer the authority, they are to be regarded as *quasi guardians*, and must account accordingly. (*Garrett v. Carr & ux.* 1 Rob. 196.)

This responsibility of guardian to ward cannot, at common law, be exacted *from* the personal representative of a guardian, nor *by* the personal representative of a ward, because that *matters of account* lie so much in privity between the parties that strangers cannot well adjust them. But by statute with us (V. C. 1873, ch. 142, § 14; V. C. 1887, ch. 159, § 3294), taken from 4 & 5 Anne, c. 16, "an action of *account* (and therefore a bill in equity) may be maintained *against the personal representative* of any guardian." And in England several statutes have been passed to remove the disability of the *personal representative of the ward* to sue the guardian for an account (namely, the Stat. 13 Edw. I., c. 23, applicable to *executors*, and 31 Edw. III., c. 11, applicable to *administrators*); but by a singular oversight these provisions have not been adopted in Virginia, unless they are to be considered as embraced in V. C. 1873, ch. 126, §§ 19, 20; V. C. 1887, ch. 119, §§ 2654-2655, allowing actions *on contract*, and actions for *torts to property* to be maintained *by or against* personal representatives, or as within the saving (V. C. 1873, ch. 15, § 2; V. C. 1887, ch. 2, § 3) of all writs, *remedial and judicial*, given by any act of parliament not local to England, prior to 4 Jac. I. (*Bac. Abr. Guardian*, (I.); *Garrett v. Carr, &c.*, 1 Rob. 196; *Lemon v. Harnsberger*, 6 Grat. 302; 1 Th. Co. Lit. 339-40, & n's (11), (12); 2 Lom. Ex. 588-9; *Cary v. Bertie*, 2 Vern. 342; *Newburgh v. Bickerstaffe*, 1 Do. 295; *Pomfret v. Windsor*, 2 Ves. Sr. 484.)

2*. The Particulars for which a Guardian is Accountable.

These particulars comprise, (1). The ward's estate which did or might have come to the guardian's hands; (2). The losses arising from the guardian's neglect; and (3). The losses arising from the misconduct of a co-guardian:

W. C.

- 1^h. The Ward's Estate which did or might have come to the Guardian's Hands.

The fundamental principle of a guardian's accountability is that he is liable "at the expiration of his trust, to deliver and pay all the estate or money in his hands, or with which he is chargeable, to those entitled thereto." (V. C. 1873, ch. 123, § 7; V. C. 1887, ch. 116, § 2603.) He must therefore account for all of the ward's estate, including all evidences of claims that did come, or, with due diligence, might have come into his possession. (Burnley v. Duke, 1 Rand. 113; Sage v. Hammonds, 27 Grat. 651; Ergenbright v. Ammon, 26 Grat. 490.) And hence, when the guardian received as part of the ward's funds his own bonds, bearing twelve per cent. interest, (which, when expressly stipulated for, was lawful between 1870 and April 1, 1873) and the amount was not invested otherwise, it was held that he should be charged twelve per cent. interest thereon until the bond was paid. (Snively v. Harkrader, 29 Grat. 113.) And in rendering that account, if the guardian was also executor or administrator of the decedent from whom the ward derived the estate, it must be observed, that as he *received* the property in the latter capacity, he must be presumed to retain it in the same character, until he shall indicate by act or declaration that his intention is to hold it *as guardian*; and it is only then that the responsibility is shifted from the sureties in the *administration* to the sureties in the *guardian's bond*. (Myers v. Wade, 6 Rand. 444; Broadus v. Rosson, 3 Leigh, 12; Morrow v. Peyton, 8 Leigh, 75-76; Hannah's Adm'r v. Boyd & ux. & als. 25 Grat. 692.)

Nor does it obviate the guardian's responsibility that he received the assets with which he is sought to be charged from a foreign jurisdiction, even though he himself may have qualified abroad, and much more supposing him to have qualified in Virginia; if he is in possession of the assets in Virginia he is answerable in our courts. (Ram. on Assets, 235; Dowdale's Case, 6 Co. 47 b; Tunstall v. Pollard, 11 Leigh, 26; Rinker v. Streit, 33 Grat. 666.)

- 2^h. Losses Arising from Guardian's Neglect, etc.

For property or debts lost by the guardian's neglect he is liable, and in the case of *debts* he is, by statute, liable for interest as well as principal. (V. C. 1873, ch. 128, § 7; V. C. 1887, ch. 121, § 2676.) But when the collection is actually made, he ought to be charged with interest from the time the money was received (of which his own oath is *prima facie* evidence), and not from the time it was *payable*. (Dilliard v. Tomlinson, 1 Munf. 183; Cavendish v. Fleming, 3 Munf. 201.)

He is also liable for payments which he *knows* he might *by law successfully resist*, it being expressly provided (V. C. 1873, ch. 128, § 7; V. C. 1887, ch. 121, § 2676) that no credit shall be allowed therefor; a doctrine which is universally admitted at common law, when the illegality appears *on the face of the security*, and although controverted, is sustained, independently of the statute, by the great weight of authority, even when the illegality, though known to the guardian, is *not apparent* on the instrument, but has to be proved extrinsically. (2 Lom. Ex. 488-9; Carter's Ex'ors v. Cutting, 5 Munf. 239; Tunstall v. Pollard, 11 Leigh, 38 '9; Kee v. Kee, 2 Grat. 116, 128; McCullough v. Dawes, 9 Dowl. & Ry. (22 E. C. L.) 40; Rogers v. Rogers, 3 Wend. (N. Y.) 503.)

A guardian may also become liable by improperly compromising or releasing a demand due his ward, or by cancelling a security therefor. And if he takes an *obligation* in his own name for a simple contract debt due his ward, he is, at law, as much chargeable as if he had received the money. It is a *quasi payment*, the new security *under seal* extinguishing the old debt. But whilst this is the general rule, which it is commonly safer to observe, yet compromises of *doubtful claims*, the payment of debts *perhaps* illegal and unrecoverable—in short, any such course of management of the ward's estate as a judicious man in the conduct of his own affairs, having respect solely to the probabilities of profit or loss to result therefrom, would have adopted under the circumstances, will be regarded by a court of equity as justifiable. (2 Lom. Ex'ors, 485 & seq.; Clay v. Williams, 2 Munf. 125; McCall v. Peachy's Adm'r, 3 Munf. 288; Bowden v. Taggart, 3 Munf. 513; Pulliam v. Johnson, 4 Munf. 71; Kee v. Kee, 2 Grat. 131; Wheatly v. Martin, 6 Leigh, 71; Braxton v. Harrison, 11 Grat. 54; Boyd's Sureties v. Oglesby, 23 Grat. 683 '4.) And this power of compromise and adjustment, on the part of not guardians only, but of *any fiduciary*, is in Virginia confirmed by statute, where it is ratified and approved *by a court of equity*. (V. C. 1873, ch. 128, § 39; V. C. 1887, ch. 121, § 2709.)

A guardian is liable for any act of negligence which injures the ward's estate, as delaying without cause the payment of a debt carrying interest; suffering a suit to be brought and costs incurred when he has means to pay the demand, and has no reasonable ground for contesting it; delaying to sue until the ward's claim is barred by the statute of limitations or lost by the debtor's insolvency. But, on the other hand, a guardian is not bound to sue when suit would plainly be vain; nor, it seems, is he

bound to appeal from a decree of a court of competent jurisdiction, in any case, however seemingly erroneous it may be, and although advised by counsel to do so. (2 Lom. Ex. 477 &c.; Liddesdale v. Robinson, 2 Brock. 160; Green v. Hanbury, Id. 404; Ergenbright v. Ammon, 26 Grat. 495 & seq.; Davis v. Newman, 2 Rob. 678; Miller v. Holcomb's Ex'or, 9 Grat. 665; Nelson v. Page, 7 Grat. 166; Mitchell v. Trotter, 7 Grat. 136; Bowers v. Glendening, 4 Munf. 219.)

So, a guardian is liable for the loss incurred by the ward in consequence of the guardian receiving payment of a gold debt well secured in a depreciated currency, except under circumstances of very strong necessity. (Crawford v. Shover, 29 Grat. 81; *Ante*, p. 471, and cases there cited; Ammon v. Wolfe, 26 Grat. 627.) It is indeed a general proposition, applicable to all fiduciaries, as it is also to agents, that they are not justified in receiving a depreciated currency except under peculiar circumstances, which may be enumerated thus;

(1), Where *ample authority* has been conferred by the will, and the fiduciary acts *in good faith*, and with *reasonable prudence and caution*;

(2), Where the *necessities of the ward*, or of the object of the trust, require it;

(3), Where the depreciated currency can be used without loss to pay debts obligatory upon the fund in his hands;

(4), Where the beneficiaries of the fund (being *sui juris*) consent to receive it without prejudice to the general interests of the trust; and

(5), When the *security is so doubtful* that it is better for the beneficiaries to take the depreciated currency than the *risk of total loss*.

See Myers v. Zetelle, 21 Grat. 752 & seq.; Campbell v. Campbell, 22 Grat. 686; Moss v. Moorman, 24 Grat. 97; Staples v. Staples, 24 Grat. 242 & seq.; Williams v. Skinner, 25 Grat. 507, 529; Tosh v. Robertson, 27 Grat. 277 & seq.; Mills v. Mills, 28 Grat. 476 & seq.; Omohundro v. Omohundro, 27 Grat. 829; Crawford v. Shover, 29 Grat. 78; Lingle v. Cook, 32 Grat. 276; 4 Min. Insts. 1242; Ward v. Smith, 7 Wal. 452.

The guardian is not liable, at least in equity, for the goods of the ward which are stolen or destroyed without his default; that is, notwithstanding the employment on his part of such care as a man of ordinary prudence takes of his own goods. So no liability arises when the loss accrues by the failure of a security in which common usage and belief warrant confidence. It is indiscreet, however, to select investments depending on mere *per-*

sonal security. They should be either protected by a lien on lands, or should consist of such stocks and public bonds as the courts of chancery are at that time accustomed to direct investments to be made in. But the safer way is to apply for and adopt the advice of the court under whose direction the guardian's account is settled, which is expressly empowered by statute (V. C. 1873, ch. 128, § 30; V. C. 1887, ch. 121, § 2700), to order the fund in hand "to be invested or loaned out, or to make such other order respecting the same as may seem to it proper." But such order can be legally made only by the court in term, and not by the judge in vacation, after notice to the parties concerned, either given specially, or by the general notice, which the commissioner is required to post at the courthouse door. (*Whitehead v. Whitehead*, 23 Grat. 379; *Beery v. Frick*, 22 Grat. 649.) During the late war the *Richmond legislature*, which wielded *de facto* the government in Virginia, by statute (Acts 1862-'3, p. 81, ch. 46, § 1), authorized any *circuit judge* in term, or *in vacation*, to direct fiduciaries (including guardians) to invest in the bonds and certificates of debt of the Confederate States, or of Virginia, or any other sufficient bonds or securities of or within the States; and such investments, therefore, being made according to the law of the *de facto* government, would it seems, exonerate the guardian (see 1 Lom. Ex. 480, 483, &c.; 1 Stor. Eq. §§ 89, 90; *Clough v. Bond*, 3 My. & Cr. (14 Eng. Ch.) 496); that is, supposing the transaction to be fair, and that the three circumstances contemplated by the statute concur, namely: (1), That the money is actually in his hands; (2), That it was received in the *due execution* of his trust; (3), That for some cause he is *unable to pay it over* to the parties entitled. But these circumstances must all concur in order to warrant such action on the part of a judge *in vacation*, or in term, in pursuance of the act in question. Hence, if the fund to be invested is not actually *in hand*; or if it was not received in the *due exercise* of the fiduciary's duty; or if it was practicable to pay it over to the persons entitled; in none of these cases is such an order legal, under this statute, nor will it afford any protection to the fiduciary. (*Campbell v. Campbell*, 22 Grat. 649, 684; *Crickard v. Crickard*, 25 Grat. 421, &c.; *Crawford v. Shover*, 29 Grat. 80 & seq; *Kirby v. Goody-Koontz*, 26 Grat. 301 '2 & seq.) It is a general principle applicable to fiduciaries of all kinds, and, amongst others, to guardians, that no more should be required of them than that they act in *good faith*, and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs.

(Knight v. Ld. Plymouth, 3 Atk. 480; Thompson v. Brown, 4 Johns. C. R. (N. Y.) 619, 628; Hart v. Ten Eyck, 2 Do. 62; Taylor v. Benham, 5 How. 233; Elliot v. Carter, 9 Grat. 541, 559-'60; Davis v. Harman, 21 Grat. 200; Myers v. Zetelle, Id. 758 to 760; Crickard v. Crickard, 25 Grat. 421, &c.; 4 Min. Insts. 1242.)

In general, a guardian is liable for the acts and defaults of an agent as though they were his own; but where the employment of an agent is necessary, or under like circumstances is usual, this stringent rule of liability is relaxed, and nothing more is required of him than the exercise of *good faith* and of ordinary care in selecting his agent, and in watching his conduct and solvency. Hence, if money be deposited by a guardian in bank, not to his individual credit (which would be treating the money *as his own*), but to his credit *as guardian*, the failure of the bank involves no liability on his part, if he selected it as a place of deposit in *good faith*, and exercised ordinary discretion, care, and vigilance. (4 Min. Insts. 1243; 2 Lom. Ex. 482; Clough v. Beard, 3 My. & Cr. (14 Eng. Ch. 496; 2 Wh. & Tud. L. C. (Pt. II., ed. 1877), p. 1805; Pidgeon v. Williams, 21 Grat. 251; Davis v. Harman, 21 Grat. 203; Vaiden v. Stubblefield, 28 Grat. 162 & seq.)

The guardian is not to be charged with the ward's services, even as a set-off to his board, unless they were such as, under the existing circumstances, the guardian ought fairly to have expected to afford compensation for them. (Armstrong v. Walkup & als. 12 Grat. 613; Evans v. Pearce, 15 Grat. 516; Snaveley v. Harkrader, 29 Grat. 128-'9.)

The sale of the ward's property at an under value, when by a prudent discharge of his duty, and the exercise of a reasonable discretion on the part of the guardian in respect of time and place of sale, or the credit allowed, more might have been obtained, subjects the guardian to make good the loss. And much more is he liable if, by himself or another, he converts the wards goods to his own use, whether corruptly and with ill design or honestly, but through negligence or inadvertence, as where he applies them to discharge a debt due from himself. The law stamps the transaction as fraudulent, however innocent the intention of the parties. And whoever comes into possession *knowingly* of such effects, by collusion with the guardian, and by co-operating in his fraud or misappropriation, is liable to the ward, as the guardian is, for what is so received. (2 Lom. Dig. 476; Dodson v. Simpson, 2 Rand. 294; Graff v. Castleman, 5 Rand. 195; Broadus v. Rosson, 3 Leigh, 12; Fisher v.

Bassett, 9 Leigh, 119; Pinckard v. Woods, 8 Grat. 140; Hunter v. Lawrence, 11 Grat. 132; Jackson v. Uppengraffe & als. 1 Rob. 107; Asberry v. Asberry, 33 Grat. 470.)

It is lastly to be remarked upon this topic, that if the ward, being *sui juris*, has received property from the guardian, by will or otherwise, with a stipulation in the form of a condition, or in any other form, that the ward shall relinquish all claims against the guardian or his estate, the acceptance and enjoyment of the property operates to estop the ward from setting up any demand against the guardian or his estate, growing out of the wardship, although no release of such demand may have been expressly made. The stipulation must be viewed as creating a case of election or of condition, and in either aspect, the ward, having made his election, or having accepted the property encumbered with the condition, is precluded from asserting any claim contrary to the stipulation. (2 Stor. Eq. §§ 1075 & seq.; 1 Jarm. Wills (5 Am. ed.), 443 & seq.; Noys v. Mordaunt (2 Vern. 581), 1 Wh. & Tud. L. C. 223; Streatfield v. Streatfield (Cas. Temp. Talbot, 176), 1 Wh. & Tud. L. C. 225; Kinnaird v. Williams, 8 Leigh, 400; Dickinson v. Dickinson, 2 Grat. 496; Norman v. Cunningham, 5 Grat. 77, 83; Gregory v. Gates, 30 Grat. 89, 90; Lewis v. Overby, 31 Grat. 621-'2.)

3^d. Losses Arising from the *Misconduct of a Co-Guardian*.

Where there are several guardians, the default of one is not chargeable upon a co-guardian who *did not concur in the act*. But any *manner of concurrence* will subject him to answer, such as voluntarily committing the ward's funds, without sufficient reason, to the defaulter, or arranging that he shall receive them. (2 Lom. Ex. 490 & seq.; Bac. Abr. Ex'ors, (D.); Id. Guardian, (H.); Morrow v. Peyton, 8 Leigh, 64, 68; Graham v. Austin & als. 2 Grat. 273; Frazer's Adm'r v. Beville & als. 11 Grat. 15.)

But if the funds are committed to the co-guardian in *another capacity* (e. g., as a banker), the liability is no more than when they are entrusted to any other banker. Business cannot be transacted without trusting some one, and it is no more unlawful to trust a co-guardian, in another capacity than as guardian, than it is to trust a stranger. (2 Lom. Ex. 493-'4, 497; Bacon v. Bacon, 5 Ves. 331; Langford v. Gascoyne, 11 Ves. 335-'6; Davis v. Spurling, 1 Russ. & My. (5 Eng. Ch.) 66; Boyd's Ex'ors v. Boyd's Heirs, 3 Grat. 113.) It seems, therefore, to be deducible from the authorities, that in equity, generally speaking, the duty of a guardian is *not to part with the assets to a co-guardian*, but that in some instances it is allowable; and that whenever the transfer is made, the

guardian who makes it is liable therefor, unless it is done for some *sufficient reason*, and usually for a specific purpose, as above explained.

As to the effect of *joint receipts*, as between co-trustees on the one side, and co-executors or co-guardians on the other, as making them all liable for what is acknowledged to be received, see 2 Lom. Ex. 498, &c. ; Price v. Stokes, 11 Ves. 324-'5 ; Ld. Shipbrooke v. Ld. Hinchinbrooke, 16 Ves. 479 ; 4 Min. Insts. 210.

3^g. The Means Provided in Virginia to Compel the *Prompt and Accurate Settlement* of Guardian's Accounts.

Thus much for the general principles which regulate the *guardian's accountability*. We are next to consider the *apparatus* provided by law to compel the prompt and accurate settlement of guardian's accounts, and the principles which regulate the preparation for such settlements.

The provisions of our statute upon this subject are eminently wise. They are designed, (1), To provide one or more officers in each county, who shall be charged specially with the supervision of the accounts of guardians and other fiduciaries ; (2), To secure an early return of an *inventory* of whatever property may come to the fiduciary's hands, and also of an *account of any sales* which he may make ; and (3), To compel an *annual settlement* of his accounts. Accordingly, in the further exposition of the subject, we will consider, (1), The commissioner of accounts for each court charged with the appointment of guardians ; (2), The return by the guardian of an inventory, and an account of sales made by him ; and (3), The annual settlement of guardian's accounts ;

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1^h. The Commissioner of Accounts.

We have seen that the circuit, county, and corporation courts with us are charged with the superintendence of the settlement of guardian's accounts, and the control of their conduct. (V. C. 1887, ch. 116, §§ 2599, 2600, 2603, & seq.) In order to facilitate their supervision, the judge of every court of probate is required to "appoint a *Commissioner of Accounts*, who shall have a general supervision of all fiduciaries admitted to qualify in that court, and make all *ex parte* settlements of their accounts." (V. C. 1887, ch. 121, § 2671.)

It is the duty of the *commissioner of accounts* to get from the clerk of his court, after each term, a list of all the fiduciaries who have qualified thereat ; and thenceforward it is his duty to require them punctually to conform to the directions of the law, in respect to an *inventory* of the property subject to their control ; to an *account of sales* ; and to the *periodical settlement* of their

accounts. And in order that the commissioner may perform his duty systematically, it is required of him to keep a record called the "Record of Fiduciaries," showing in several columns the particulars following (V. C. 1873, ch. 128, §§ 1 & seq.; V. C. 1887, ch. 121, §§ 2671 to 2675, 2678, &c.; Matt. Com'rs. 28), namely:

1.	2.	3.	4.	5.	6.	7.	8.	9.
The name of the Fiduciary.	The name of the Decedent whom he represents.	The name of the living person for whom he is guardian, curator or committee.	The penalty of the Fiduciary's official bond.	The names of his sureties.	The date of the order conferring his authority.	The date of the order <i>revoking</i> his authority, if it be revoked; and which fact is to be certified by the clerk of the court to the comm'r.	Date of the <i>return</i> of the <i>inventory</i> of the estate.	Date of the <i>account</i> of the Fiduciary's accounts.

2^d. The return of the Inventory and Account of Sales by the Guardian.

Every guardian is required, within *four months* from his qualification, and within four months after any subsequent accession of property belonging to the ward, to return to the *commissioner of accounts* an inventory of all the estate, real and personal, which is subject to his authority as guardian; and if he fail so to do, the commissioner shall take proper steps to compel him to do it, by causing the court to impose on him a fine of from \$50 to \$500 for any delinquency; and if he persists in his contumacy, to proceed against him for *contempt of court in disobeying its order*. The guardian is also required, within *four months* after *any sale* of the ward's property, to return to the *commissioner of accounts* an account of sales. Both these returns the commissioner is to inspect, and if they are in proper form, he is, within *ten days*, to deliver them to the clerk of the court *to be recorded*. (V. C. 1873, ch. 128, §§ 4 to 6; V. C. 1887, ch. 121, §§ 2673 to 2675.)

These provisions very happily secure the means of holding guardians to a just accountability. Most of the defaults of this class of fiduciaries arise, not out of a preconceived purpose of dishonesty, but from negligence in preserving a memorial of what comes to their hands, and a delay in

settling their accounts; and to this latter object (namely, to compel an *annual settlement*) the statutory provision next to be mentioned is addressed.

2^h. The *Annual Settlement of Guardian's Accounts*.

Every guardian is required to settle his accounts *annually*, within six months after the end of every year, before the *commissioner of accounts* of the court which appointed him. And if he fails to do so, the commissioner is directed to take steps to compel him, by means of a fine of from \$50 to \$500, to be imposed by the court, and if need be, by proceeding for *contempt*; and he also forfeits all compensation for his services during the period to which the commission relates; but this denial of compensation is not to apply where the guardian has within the six months after the end of any year furnished the ward (being *non adult*) with a statement of the account, and settled the same with him; nor where he has laid a statement of his account before a commissioner in chancery, upon an order of account in a pending suit. (V. C. 1873, ch. 128, §§ 8 to 11; V. C. 1887, ch. 121, §§ 2678 to 2681; Synops. Crim. Law, 212-'13.) Until a recent period this forfeiture was very wholesomely absolute, however meritorious the guardian's administration. (Wood's Ex'or v. Garnett, 6 Leigh, 274; Boyd's Ex'ors v. Boyd's Heirs, 3 Grat. 124-'5.) But by statute, since 1870, it has been in the discretion of the court. (V. C. 1873, ch. 128, § 9; V. C. 1887, ch. 121 § 2679; Lovett v. Thomas, 81 Va. 256-'7.

For the steps to be taken to secure the funds in the guardian's hands, if they shall seem to be in danger, and if need be, to remove the guardian and appoint a new one, reference may be made to the statute. (V. C. 1873, ch. 128, §§ 17, 18 & seq.; V. C. 1887, ch. 121, §§ 2686 to 2688.)

The commissioner is required to give notice of the fact that a guardian's account is pending before him, by notice at the front door of the courthouse on the first day of a county or corporation court, and he is not to complete the same until ten days after such notice. Any one interested, or his next friend, may appear before the commissioner, and insist upon or object to anything, in like manner as if the commissioner were taking an account by order in a pending suit. The commissioner is to file his report *as soon as it is completed*, and after the *lapse of a month* it is open to examination by the court, when the court shall consider it, with any objections which may be made thereto, and confirm it, in whole or in part, or recommit it to the same or another commissioner, as upon the whole may be deemed right. When the report is confirmed, it is *recorded*, and is thenceforward taken *prima facie* to be correct, subject, however, to be *sur-*

charged and falsified by a suit instituted in due time for the purpose, wherein the alleged surcharge or falsification shall be set forth specifically. And where the report shows money to be in the guardian's hands, the court may order payment of it to whom it may be due, or that it be invested, loaned, or otherwise disposed of, as to it may seem proper. (V. C. 1873, ch. 128, § 30; V. C. 1887, ch. 121, §§ 2696 to 2702.) But in order that any such order of court may be obligatory upon the parties or an acquittance to the guardian, the commissioner must have posted the required notice at the front door of the courthouse, as we have seen the law requires, or special notice must have been given of the design to apply to the court. (*Whitehead v. Whitehead & als.* 23 Grat. 379-'80.)

If there are several wards, it is the guardian's duty to keep *separate accounts with each*; and whether he does it or not, the commissioner must state the accounts with them severally, and, as far as practicable, bring the items applicable to each under the proper account to which it belongs. (*Bac. Abr. Guardian, (I.)*; *Armstrong v. Walkup*, 9 Grat. 376.)

Very similar provisions are applicable to other fiduciaries besides guardians,—as to personal representatives, curators, and committees of lunatics; and also to trustees in deeds of trust. (V. C. 1873, ch. 128, §§ 4, 5 & seq.; V. C. 1887, ch. 121, §§ 2673 to 2675.)

4^g. The Mode of Stating Guardian's Accounts.

In respect to the mode of stating guardian's accounts, it will be proper to advert to, (1), The general principles regulating the statement of such accounts; (2), The mode of charging interest in respect of guardians; (3), Allowances to guardians; (4), Doctrine touching the validity of a guardian's private settlement with his ward, etc.; (5), Doctrine as to the guardian's own examination before the commissioner; (6), Doctrine as to the production of books and vouchers; (7), Mode of proceeding by ward against guardian, and limitation thereto; and (8), Form of stating guardian's accounts;

W. C.

1^h. The General Principles Regulating the Statement of Guardian's Accounts.

In making these yearly statements, an *annual rest* is made, of course, and a *balance struck*.

The accounts of each year embrace the transactions thereof, both receipts and disbursements, the receipts being stated on one side, and the disbursements on the other. *No interest* is usually calculated on the individual items on either side, and that notwithstanding the receipts may have been *early*, and the disbursements *late* in the

year, or *vice versa*. The balance being struck on the transactions of the year, it *bears interest throughout the next year*, and usually constitutes the first item in the next year's statement.

This method of omitting interest on the separate items of the year's transactions on both sides, upon the whole, is not unequal, and at all events, as a *general rule*, is expedient, in order to save time, of which much would be consumed at a great expense (the commissioner being paid by the hour), if computations of interest were to be made on each of the multiplied particulars of receipt and disbursement of which a guardian's account commonly consists. And if in any instance the rule works a hardship, it is in the discretion of the commissioner and of the court to recede from it, being merely a rule of convenience. Thus, if a large sum is received or disbursed early in the year, and it would be unreasonable, under all the circumstances, to deny interest thereon until the end of the year, it may be allowed on the money *disbursed* from the date of the payment, and on the money *received* after a *reasonable time* for its investment. The common law fixes this *reasonable time* at the unreasonably *long* period of *six months*, whilst in Virginia it is, by statute (in the case of *guardians*), fixed at the more unreasonably *short* period of *thirty days*. (Hooper v. Royster, 1 Munf. 132; McCall v. Peachy's Adm'r, 3 Munf. 303; Garrett v. Carr, 1 Rob. 209; Armstrong v. Walkup, 12 Grat. 613; V. C. 1873, ch. 123, § 12; V. C. 1887, ch. 116, § 2608.) And it is considered that the allowance even of the *thirty days* is applicable only where the guardian actually *invests* the money. If he *retains* it in his own hands, he is to be charged with interest from the *date of its receipt*. (Snively v. Harkrader, 29 Grat. 113, 117, 129, 131.) But the commission to which the guardian may be entitled on the sum received ought to be deducted before the interest is computed. (S. C.)

2^b. The Mode of Charging Interest in respect of Guardians, on the Annual Balances.

The balance appearing to be due on either side by these annual settlements is to bear interest *during the ensuing year*, without qualification, if the balance be *in favor of the ward*, and is retained in the guardian's hands; but if it be loaned out or invested, the guardian is charged with such interest only as he does or *ought* to receive; and that as well where the balance is composed of interest or of *estimated profits*, as in other cases. (Garrett v. Carr, 1 Rob. 211.) But where the balance is *in favor of the guardian*, interest is not allowed upon so much thereof as consists of *interest*, or of mere *estimated and conjectural*

amounts. The statute itself, indeed, expressly requires (V. C. 1873, ch. 123, § 10; V. C. 1887, ch. 116, § 2606), that if any balance, whether of profits *received or estimated*, or of *interest on principal*, be due by any guardian, or other person *acting as guardian*, at the end of any year, which ought to be invested or loaned out, within a reasonable time, for the benefit of the ward, and the same remains *in the hands of such guardian*, etc., he shall be charged with interest on such balance from the end of the year in which it arose, and so on *taliesquoties*, during the continuance of the trust. But from the termination of the wardship, by the ward's coming of age or otherwise, the account is to be settled upon the ordinary principles of debtor and creditor as to interest, compound interest being generally excluded on both sides. (Garrett, Ex'or &c. v. Carr, 1 Rob. 196; Childress v. Deane, 4 Rand. 406; Jackson v. Jackson, 1 Grat. 144; Cunningham v. Cunningham, 4 Grat. 43; Handley v. Snodgrass, 9 Leigh, 484; Armstrong v. Walkup, 12 Grat. 608, 812; Evans v. Pearce, 15 Grat. 515.)

And this rigor towards guardians has induced the legislature to allow them to recover compound interest on all "*bonds payable to them as guardians, and held for the benefit of the ward.*" (V. C. 1873, ch. 123, § 11; V. C., 1887, ch. 116, § 2607.)

3^d. Allowances to Guardians.

Allowances to guardians will include, (1), Disbursements by guardians; and (2), Compensation to guardians; w. c.

1st. Allowance of Disbursements by Guardians.

A guardian is allowed in his account any debts which he may *properly* have paid for his ward, whether contracted by himself, or obligatory upon him, as descending from his father, etc.; any expenses reasonably incurred by the guardian in the fulfilment of his trust, such as the cost of clothes, education, and other needful personal expenses of the ward, and such also as reasonable fees to counsel (although they may be greater than the law at the time prescribed), taxes, reasonable charges for the recovery of the ward's property when lost, hires of laborers, and other expenses incident to the cultivation of the ward's lands, repairs, and suitable and beneficial improvements to the ward's houses, etc.; and, under circumstances making it necessary, clerk's hire, rent of counting-room, postage, etc., although these latter charges, when not *necessarily* considerable, are usually regarded as satisfied by the commissions of the guardian. (Lindsay v. Howerton, 2 H. & M. 9; Nimmo's Ex'or v. Com'th, 4 H. & M. 57; Hooper v. Royster, 1

Munf. 129, 132; *Hipkins v. Bernard*, 4 Munf. 93; *Foreman v. Murray*, 7 Leigh, 416, 418; *Ferneybough's Ex'ors v. Dickinson*, 2 Rob. 582, 589; *Newton v. Poole*, 12 Leigh, 140.)

In respect to the expense of maintaining the ward, it is well settled that if the father be living, and of sufficient ability, he is under a *legal obligation* to defray the charges, which in that case are not to be allowed to the guardian. (*Evans v. Pearce*, 15 Grat. 515; *Griffith v. Bird*, 22 Grat. 80; *Ante*, p. 409.) Although the court of chancery, upon the application of the father, may direct the estate of the infant to be applied to his maintenance and education whenever, under all the circumstances, it appears to be proper. (*Ante*, p. 409; *Evans v. Pearce*, 15 Grat. 515-16; *Griffith v. Bird*, 22 Grat. 80.) On the other hand, where the guardian is not the parent, or is at liberty to charge the ward with his support, he is to be credited with the expense, notwithstanding he may have, at a previous period, declared (without valuable consideration) that he did not intend to charge him. (*Hooper v. Royster*, 1 Munf. 119; *Cunningham v. Cunningham*, 4 Grat. 45; *Armstrong v. Walkup*, 9 Grat. 376; *Evans v. Pearce*, 15 Grat. 516; *Sayers v. Cassell*, 23 Grat. 532.)

As to the *vouchers* upon which these or other charges against the ward are to be allowed, they must be reasonably satisfactory to prove that the demand *is just*, (which, in the absence of any circumstances of suspicion, may be afforded by the creditor's own *affidavit*), and that it *was paid*, which is generally proved by the *creditor's receipt*. But it seems that where an *ex parte* settlement has previously taken place, and a suit in equity is brought to *surcharge and falsify*, the vouchers referred to in the previous settlement are to be presumed satisfactory, and the burden of proof is upon the impeaching party. (2 Lom. Ex. 549; *Corbin v. Mills*, 19 Grat. 438; *Newton v. Poole*, 12 Leigh, 143.) And in some cases the guardian may properly be allowed small amounts *on his own affidavit alone*, especially where the account is of old standing, as over fourteen years, or the expense must probably have been incurred, and from its nature could not be expected to be sustained by other vouchers, *e. g.* travelling expenses, postage, etc. (2 Lom. Ex. 549, 553, &c.; *McCall v. Peachy*, 3 Munf. 305; *Newton v. Poole*, 12 Leigh, 140, 142; *Fitzgerald v. Jones*, 1 Munf. 150; *Liddesdale v. Robinson*, 2 Brock. 160; 1 Greenl. Ev. § 147, n. t.)

2^d. Allowance of Compensation to Guardians.

The compensation to be allowed the guardian is in

the discretion of the commissioner, subject to the control of the court; or as the statute expresses it (V. C. 1873, ch. 128, § 25; V. C. 1887, ch. 121, § 2695), it is to be a "*reasonable compensation in the form of a commission on receipts, or otherwise.*" The common law denies the guardian any compensation whatever, (except in so far as it is bestowed by the father's will, or voluntarily conceded by the ward upon attaining his age, and after a final and complete settlement), regarding the office as one of friendship merely, which ought not to be undertaken for gain, and cannot be properly rewarded with money; and fearing that to allow compensation would open the door to abuses. (Robinson v. Pett, 3 P. Wms. 249; Hylton v. Hylton, 2 Ves. Sr. 548; 2 Wh. & Tud. L. C. (Pt. I.) 337, 339; Moore v. Frowd, 3 My. & Cr. (14 Eng. Ch.) 50.) Our law in Virginia (and generally in the United States) takes a less sublimated view, and considers that it is best for the helplessness of infancy, that guardians should receive a fair compensation for their services, so as to induce competent persons to undertake the trust and to discharge it with assiduity. (2 Stor. Eq. § 1268, n. 1; 2 Wh. & Tud. L. C. (Pt. I.) 353, &c., 376.) A similar state of society, and a corresponding assimilation of thought, has led to the practice of compensating guardians, (and usually *by commissions*), in most of the colonial dependencies of Great Britain, as, for example, in the West and East Indies. (Chatham v. Audley, 4 Ves. 72; Chambers v. Goldwin, 5 Ves. 837; S. C. 9 Ves. 268; Cockrell v. Barber, 2 Russ. (3 Eng. Ch.) 585.)

The *amount of compensation* allowed depends on the time, trouble and pecuniary responsibility involved in the guardian's duties in the particular case, with some reference also to the value of his services to the ward. The statute enacts that it shall be "*a reasonable compensation, in the form of a commission (on receipts) or otherwise.*" It is accordingly, for the most part, a commission on *receipts*. (V. C. 1887, ch. 121, § 2695.) It is allowed on each year's transactions separately, and, therefore, is to be credited to the guardian before the annual balance is struck. (Cavendish v. Fleming, 3 Mumf. 201-2, and note; Ferneyhough v. Dickinson, 2 Rob. 589; 2 Lom. Ex. 544.) The *amount* of the commissions is commonly *five per cent.*, but it may be less or more, as peculiar circumstances may make just; and so fixed is that ratio of compensation, that where the deceased father of the ward directed that the guardian should be *handsomely paid*, the court still fixed on *five per cent.* as the proper allowance. (Waddy v. Hawkins,

4 Leigh, 58; Triplett v. Jameson, 2 Munf. 243-'4; Sheppard v. Starke, 3 Munf. 42; Hipkins v. Bernard, 4 Munf. 93; Boyd's Sureties v. Oglesby, 23 Grat. 674.)

A commission of seven and a-half, and even of ten per cent., has been allowed under peculiar circumstances, as where the estate was troublesome to manage, and the amount of *money* received small. (Fitzgerald v. Jones, 1 Munf. 156, 159-60; McCall v. Peachy, 3 Munf. 306-'7; Cavendish v. Fleming, 3 Munf. 202; 2 Wh. & Tud. L. C. (Pt. I.) 361-'2; Pusey v. Clemson, 9 Serg. & R. (Pa.) 209.)

On the other hand, if the guardian be left a legacy by *way of compensation* for his services, nothing is to be allowed in the form of commissions. (Jones v. Williams, 2 Call, 105; Granberry v. Granberry, 1 Wash. 250; Freeman v. Fairlie, 3 Meriv. 24; Cockerell v. Barber, 2 Russ. (3 Eng. Ch.) 585; 2 Wh. & Tud. L. C. (Pt. I.) 367-'8.)

Compensation to a guardian being with us matter of *right and not of grace*, is not usually forfeited, save by statute, by his misconduct; but in Virginia he is, as we have seen, expressly deprived of his commissions by statute (V. C. 1873, ch. 128, § 9; V. C. 1887, ch. 121, § 2679) when he omits to *settle his accounts annually*, as required by law; and this forfeiture it was formerly not in the power of the court to remit to him (6 Leigh, 274-'5; 1 Grat. 13; 3 Grat. 125; Morris v. Morris, 4 Grat. 345; *Ante*, p. 483); although at present it is within the reasonable discretion of the court. (V. C. 1873, ch. 128, § 9; V. C. 1887, ch. 121, § 2679; Lovett v. Thomas, 81 Va. 256-'7; Brent v. Clevinger, 78 Va. 16; Trevelyan v. Lofft, 83 Va. 148.) And if he improperly convert property *into money*, he is denied commissions on the proceeds. (2 Wh. & Tud. L. C. (Pt. I.) 357; Bank of Virginia v. Craig, 6 Leigh, 437.)

As to the *subject-matter* on which the percentage of commissions is to be computed, we have seen that it is *receipts*, and *not disbursements*; and under the description of *receipts*, are reckoned *bonds* which the guardian might *rightfully* have collected, but did not, and ultimately, with the ward's consent, paid over to him in kind as so much money (Ferneyhough v. Dickinson, 2 Rob. 582, 589; Claycomb v. Claycomb, 10 Grat. 592); and so, where the guardian converts bonds or other debts into mortgages (without receiving the money), and delivers the mortgage to the ward (Hipkins v. Bernard, 4 Munf. 92.) And of course money of the ward on hand at the commencement of the wardship is to be reckoned amongst the *receipts*, as are also the proceeds of *crops*, or indeed of any chattels *rightfully* sold (Hipkins v.

Bernard, 4 Munf. 92). But strange to say, although commissions are the guardian's compensation for the trouble he has about the whole trust, in taking care of the ward, in managing his property, in selling it and receiving the price, including the risk of taking counterfeited money, which, in general, would be his loss (*Taliaferro v. Minor*, 2 Call. 192); and also in paying out money, and accounting, as well as in collecting debts, yet it is held that the guardian can have no commissions on debts *due from himself* to the ward, with which he charges himself; as if the mere *receipt of the money* constituted the whole consideration for the commission, and the custody, disbursement, and accounting were nothing. (*Carter's Ex'ors v. Cutting*, 5 Munf. 227; *Ferneyhough v. Dickinson*, 2 Rob. 582. See *Contra*, *Cockrell v. Barber*, 2 Russ. (3 Eng. Ch.) 588-'9, & n. (b).)

Commissions are not in general to be allowed twice upon the *same capital*, notwithstanding the investment be changed; but (after being once allowed on the principal) only on the income arising from it. (*McCall v. Peachy*, 3 Munf. 297; 2 Wh. & Tud. L. C. (Pt. I.) 363, 365-'6.)

The rule when the fund comes into the hands of a *successor*, as to the allowance of a second commission, is not well defined. In New York it is usual not to *permit a guardian to resign*, except upon his relinquishing any commissions upon the fund transferred to his successor, whence it would seem to follow that, but for such an arrangement, a double commission would be allowed. *Sed quare*. (2 Wh. & Tud. (Pt. I.) 357; *Jones' Case*, 4 Sandf. Chy. 616.)

Commissions are not to be computed upon the *value of property* belonging to the ward, and finally turned over to him in kind, unless, from being *perishable* or otherwise, it be such property as the guardian might with propriety have sold or converted into money, as in case of the bonds above mentioned; and if the guardian shall appear to have converted the ward's property into money with a view to commissions, where there was no sufficient reason therefor, commissions will be denied him. (*Bank of Virginia v. Craig*, 6 Leigh, 437; *Ferneyhough v. Dickinson*, 2 Rob. 582, 589; *Claycomb v. Claycomb*, 10 Gratt. 592; 2 Wh. & Tud. L. C. (Pt. I.) 357.)

Whether a guardian who employs an attorney or agent to collect money shall be allowed a commission thereupon, in addition to the compensation paid the attorney, depends on whether a prudent man would, under like circumstances, have employed an attorney to *collect his own money*. If he would, the guardian is to

be allowed a commission in addition to that paid the attorney; otherwise not. (*Carter's Ex'ors v. Cutting*, 5 Munf. 241.)

Where there are several guardians the compensation is to be equally divided amongst them, unless some reason appear to the contrary; *e. g.*, an *unequal share* of the labor and responsibility. (*Claycomb v. Claycomb*, 10 Grat. 589.)

In England a guardian, who is an attorney, cannot charge for his own professional services, but is permitted to employ another person, and to pay him for advice and aid. (2 Dan. Chan. Pr. 1432; 2 Wh. & Tud. (Pt. I.) 339-40.) In Virginia it is said to be the practice to allow attorneys who are fiduciaries a proper compensation for their professional services in the conduct of the business. (Matt. Guide for Com'rs, 99, 100.)

4th. Doctrine Touching the Validity of a Guardian's Private Settlement with his Ward, and of a Conveyance by the Ward to Him.

A guardian's private settlement with his ward is always scrutinized with rigor; and a *release without a settlement*, especially soon after the ward attains his age, however fair it may really be, is so liable to abuse and fraud as to be regarded in equity as constructively fraudulent and *voidable* at the instance of the ward. And upon like principles, a *conveyance* from a ward to a guardian, made soon after attaining age, and without a settlement of accounts, is viewed in the same light, as a transaction too likely to be a cloak for fraud to be tolerated, and therefore regarded in equity as constructively fraudulent, and voidable by the ward. So, also, for kindred reasons, no fiduciary of any description is permitted to deal *for his own benefit* with the subject matter of his trust, not only because the parties are not on an equal footing in respect to acquaintance with the subject, but also because to allow the validity of such transactions would tend to corrupt the integrity of persons so situated, by setting their interest in opposition to their duty. For these reasons, the law holds transactions of that kind to be always *voidable by the beneficiary*, whilst they are binding upon the fiduciary. (Bac. Abr. Guardian, (II.); 1 Stor. Eq. §§ 317 & seq., 321 & seq.; 2 Rob. Pr. (1 ed.) 158-9; *Armistead v. Waller*, 2 Leigh, 14; *Buckles v. Lafferty's Legatees*, 2 Rob. 292, 299, &c.; *Segar v. Edwards*, 11 Leigh, 213; *Bailey v. Robinson*, 1 Grat. 4, 9, 10; *Howery v. Helms*, &c. 20 Grat. 7, &c.; 1 Wh. & Tud. L. C. 126, 134, 140; *Fox v. Mackreth*, 2 Bro. C. C. 400; S. C. 2 Cox, 320; *Killick v. Flexney*, 4 Bro. C. C. 161; *Hall v. Hollet*, 1 Cox, 134; *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves.

601; *Whichcote v. Lawrence*, 3 Ves. 940; *Ex parte Bennett*, 10 Ves. 381; *Downes v. Glazebrook*, 3 Mer. 200; *Ante*, pp. 244-45.)

5th. Doctrine as to the Guardian's own Examination Before the Commissioner.

It is the ordinary practice in equity, in every decree or order of account, to direct that the master-commissioner may examine the parties upon interrogatories, in which case their answers are regarded as if made to a bill filed. Hence, so far as the answer is responsive to a question, it is evidence *for the respondent*; and the answer of one party is not, as a general rule, to be used against another (although a co-party), but only against the respondent himself. But where of two co-parties one is in default and contempt, omitting to obey the commissioner's summons to appear before him, but, by his answer to the bill, acknowledging indebtedness, and another appears and is examined, stating the particulars of indebtedness, and that the assets to meet it were all turned over to the other party, it was considered admissible, under the peculiar circumstances, to presume against the party in default that he was solely responsible, and it was decreed accordingly. (2 Lom. Ex. 551-2; 2 Rob. Pr. (1st ed.) 329-30, 404; 2 Smith's Chan. Pr. 122; *Templeman v. Fauntleroy*, 2 Rand. 434, 445.)

It is a general rule, in taking accounts before a commissioner, that a party, in his examination, may charge and discharge himself *in the same sentence*, but not in different sentences. And so, if by his answer he admits a fact, and insists on a distinct fact by way of avoidance, he must prove the latter by other testimony, whilst the fact admitted is thereby established against him. Thus, if a guardian admits the receipt of money for his ward, but claims to have disbursed it legally, his admission is sufficient evidence of the receipt, but the proper disbursement is to be proved by other satisfactory means. On the other hand, where the guardian states that the ward's father *gave him a sum of money* in his life-time, if advantage is sought to be taken of the statement to prove the receipt of the money, the whole must be taken together, occurring as it does in one sentence; and the guardian can only be charged by disproving his averment as to the gift. (2 Lom. Ex. 550, 552; *Beckwith v. Butler*, 1 Wash. 224; *Payne v. Coles*, 1 Munf. 373; *Kirkpatrick v. Love*, 2 Ambl. 589; *Blount v. Barrow*, 1 Ves. Jr. 547; *Ridgway v. Darwin*, 7 Ves. 405; *Thompson v. Lambe*, Id. 588; *Robinson v. Scotney*, 19 Ves. 584.)

6th. Doctrine as to the Production of Books and Vouchers.

One of the usual directions in every decree for an ac-

count is that the parties shall produce before the master-commissioner, on oath, all books, papers, and writings in their possession touching the inquiries to be made; and these are in general retained by the master for the benefit of the parties concerned, as long as they are needed. Nor can a guardian excuse himself from producing books, etc., because he has mixed therein other transactions not relating to his trust. (2 Lom. Ex. 503; Freeman v. Fairlie, 3 Meriv. 43-4; Salisbury v. Wilkinson, 1 Cox. 278.)

7^h. Mode of Proceeding by Ward against Guardian, and Limitation thereto.

The ward may proceed by an *action at law*, on the guardian's official bond, against himself and his sureties; but as, in most cases, the settlement of the guardian's account is necessarily preliminary to any judgment, and, as a court of law has no means of adjusting such an account, it is allowable and usual to sue the guardian and his sureties *in equity*, which, by means of one of its master-commissioners, is enabled, with facility, to take the needed accounts. Such a suit, whether in law or in equity, may be brought during the ward's non-age, in his name, by his *prochein ami*, or next friend, or, after he attains his age, by himself alone. (2 Rob. Pr. (1st ed.) 158.)

But the suit *upon the bond*, whether at law or in equity, is in Virginia limited by statute (V. C. 1873, ch. 146 §§ 8, 9; V. C. 1887, ch. 139, §§ 2920, 2921), to *ten years* from the time when the right of action first accrued, which is declared to be from the "time when the ward attains the age of twenty-one years, or from the termination of the guardian's office, whichever shall happen first," saving to infants, married women (unless where the suit *affects her separate estate*), and insane persons, the like number of years after the removal of their disabilities, but so as in no case to exceed twenty years from the accrual of the right of action. (V. C. 1873, ch. 146, §§ 9, 18; V. C. 1887, ch. 139, §§ 2921, 2931.) Where, however, the proceeding is *not on the bond*, but against the *guardian alone*, or his representative, on the ground of the *trust* arising out of his fiduciary relation, the statute of limitations is not applicable (V. C. 1873, ch. 146, § 9; V. C. 1887, ch. 139, § 2921), and there is no other limitation than that interposed by the discretion of the court in respect to stale and antiquated claims, where the transactions, by the lapse of time, have become obscure; or where, from the loss of vouchers or death of witnesses, injury would be likely to result; or where, from the mutual relations of the parties, a presumption of satisfaction fairly arises. (Bolling v. Bolling, 5 Munf. 334; Coleman v. Lyne's Ex'or, 4 Rand. 454; Burwell's Ex'or v. Anderson, 3 Leigh,

348; Carr v. Chapman, 5 Leigh, 171; Hayes v. Goode, 9 Leigh, 481; Handley v. Snodgrass, Id. 489; Aylett v. King, 11 Leigh, 491; Smith v. Clay, 3 Bro. C. C. 639, note; Lacon v. Briggs, 3 Atk. 105; Pickering v. Stamford, 2 Ves. Jr. 272, 581; Harwood v. Oglander, 6 Ves. 199, 217.)

8^h. Form of Stating Guardian's Accounts.

The form of stating a guardian's account will complete the illustration of the subject. It will be observed that, in the form annexed, the account is supposed to extend through *six years*; that for the first two years (what seldom happens) the balance is *in favor of the guardian*, thus affording an opportunity of showing how interest is charged in that case (namely, *on the principal alone*, and not on the interest); whilst afterwards it is on the side of the ward, and thus shows how interest is charged in that case also; and that for the last year the wardship is supposed *to be ended*, so as to entitle the guardian to be treated as an *ordinary debtor*.

The notes appended will remind the student of the explanations which have already been given in connection with the several particulars in the account which illustrate or exemplify them.

STATEMENT OF

Dr.

W. W. in account

1865.							
May	12	To Disbursements for Ward, per vouchers,.....(1)		60	00		
June	1	“ Do. Do. Do.(2)		2,500	00		
Oct.	1	“ Do. Do. Do.(3)		3,000	00		
1866.							
May	1	“ Interest on Disburs'ts of June 1, 1865, 11 mo.(a)		137	50		
		“ Interest on Disburs'ts of October 1, “ 7 “(a)		105	00		
		“ Commission on Rec'ts this year (\$50), at 5 per ct. ...		2	50		
				\$5,805	00		
1866.							
May	1	To Balance <i>per contra</i> (Prin. \$5,562.50) (b).....		5,755	00		
July	12	“ Disbursements for Ward, per vouchers,.....(4)		345	00		
Aug.	1	“ Do. Do. Do.(5)		36	00		
Sept.	10	“ Do. Do. Do.(6)		42	00		
1867.							
May	1	“ Interest on Disburs'ts of July 12, 1866, 9 mo. 18 d. (a)		16	56		
		“ Interest on Balance of last year (Prin. \$5,562.50) (b)		333	72		
		“ Commission on Rec'ts this year (\$800), 5 per ct.		40	00		
				\$6,568	28		
1867.							
May	1	To Balance <i>per contra</i> (Prin. \$5,418.00).....		5,768	28		
June	18	“ Disbursements for Ward, per vouchers,.....(7)		134	00		
July	1	“ Do. Do. Do.(8)		228	77		
1868.							
Jan.	5	“ Do. Do. Do.(9)		37	00		
Feb.	8	“ Do. Do. Do.(10)		28	00		
Mar.	9	“ Do. Do. Do.(11)		85	00		
May	1	“ Interest on Disburs'ts of June 1, 1867, 10 mo. 12 d. (a)		6	96		
		“ Interest on Disburs'ts of July 1, 1867, 10 mo.....(a)		11	44		
		“ Interest on Balance of last year (Prin. \$5,418.00).....		325	08		
		“ Commission on Rec'ts this year (\$41,670), 5 per ct....		2,083	50		
		“ Balance due Ward (c).....		32,961	97		
				\$41,670	00		
1868.							
June	24	To Disbursements for Ward, per vouchers,.....(12)		540	00		
Nov.	1	“ Do. Do. Do.(13)		56	00		
	20	“ Do. Do. Do.(14)		38	00		
1869.							
May	1	“ Interest on Disburs'ts June 24, 1868, 10 mo. 6 d (a)		25	94		
		“ Commission on Rec'ts this year (\$8,304.72) 5 per ct.		415	23		
		“ Balance due Ward,.....		40,191	52		
				\$41,266	69		
1869.							
Aug.	6	To Disburs'ts for Ward, for Coal Mine, per vouchers, (15)		4,300	00		
Oct.	1	“ Do. Do. Do. Do.(16)		720	00		
		Carried forward,		\$5,020	00		

GUARDIAN'S ACCOUNTS.

*with C. C. his Guardian.**C.*

1865. May	2	By Cash received for Ward, this day	50	00
1866. May	1	" Balance due Guardian, (Princ. \$5,562 50) (<i>b</i>)	5,755	00
			<hr/>	<hr/>
			\$5,805	00
1866. Dec.	30	By Cash received for Ward, this day.....	800	00
1867. May	1	" Balance due Guardian, (Princ. \$5,418).....	5,768	28
			<hr/>	<hr/>
			\$6,568	28
1867. May	30	By Cash received for Ward, this day.....	28,540	00
1868. Jan.	1	" Profits, one year, \$30,000 U. S. bonds.....	1,703	00
1868. May	1	" Interest on money received 30th May, 1867, after thirty days, 10 months, (<i>d</i>), (<i>a</i>).....	1,427	00
		" Estimated profits of Coal Mine, two years.....	10,000	00
			<hr/>	<hr/>
			\$41,670	00
1868, May 1869. Jan.	2	By Balance, <i>per contra</i>	32,961	97
1869. May	1	" Profits, one year, U. S. bonds of \$30,000, 6 per ct. .	1,800	00
	1	" Interest on money received Jan. 1, 1869, after thirty days, 3 months, (<i>a</i>).....	27	00
		" Estimated profits of Coal Mine, one year	4,500	00
		" Interest on balance of last year, (\$32,961 97).....(<i>e</i>)	1,977	72
			<hr/>	<hr/>
			\$41,266	69
1869. May	2	By Balance, <i>per contra invested by order of court</i>	40,191	52
1869. Nov.	1	" Half year's interest on investment, received this day.	1,205	96
			<hr/>	<hr/>
			Carried forward	\$41,397 48

*Dr.**W. W. in account with*

1869.		Brought over.....	5,020	00
Nov.	15	To Disbursements for Ward, per vouchers.....(17)	56	40
1870.				
Jan.	10	“ Do. Do. Do.	22	00
May	1	“ Interest on Disbursements, Oct. 1, 1869, 7 mo.....(a)	25	00
		“ Interest on Disburs'ts, Aug. 6, 1869, 8 mo. 24 days (a)	189	20
		“ Commission on Rec'ts this year (\$4,836.11), 5 per ct.	241	80
		“ Balance due Ward.....	39,473	23
			<u>\$45,027</u>	<u>63</u>
1870.				
Oct.	1	To Disbursements for Ward, per vouchers.....(18)	1,570	00
1871.				
May	1	“ Interest on Disbursements of Oct 1, 1870, 7 mo. (a).	44	95
		“ Commission on Rec'ts this year (\$11,434.51), 5 per ct.	571	75
		“ Balance due Ward	48,721	04
			<u>\$50,907</u>	<u>74</u>

C. C., his guardian, continued.

1869. May	1	Brought over.....	41,397	48
		To estimated profits on coal mine, one year,	3,600	00
		" Interest on money received November 1, 1869, after thirty days, 5 months,..... (a)	30	15
			\$45,027	63
1870. May Aug.	2 1	By balance <i>per contra</i> , invested by order of court,.....	39,473	23
		" Half year's interest on investment, due 1st May, 1870, \$1,205.86		
		" Interest thereon, collected of debtor, (f), . 18.09	1,223	95
Nov. 1871. Jan.	1 1	" Half year's interest on investment, due this day,	1,184	19
		" Profits on U. S. bonds, \$30,000, 6 per ct. two years,...	3,600	00
		" Interest on \$1,800, part of profits, one year,.....	108	00
May	1	" Estimated profits of coal mine, one year,	4,000	00
		" Interest on money received August 7, 1870, after thirty days, 8 months, (a).....	48	96
		" Interest on money received November 1, 1870, after thirty days, 5 months, (a).....	29	60
		" Interest on money received January 1, 1871, after thirty days, 3 months, (a).....	55	62
		" Half year's interest on present investment, received this day,.....	1,184	19
			\$50,907	74
1871. May Sept.	2 1	By balance <i>per contra</i> ,.....	48,721	04
		" Interest on balance to date when <i>ward attains his age</i> , 4 months,	974	42
			\$49,695	46
1871. Sept	1	By balance due ward this day, principal,.....\$48,721.04		
		" (g) interest,..... 974.42	49,695	46
1872. Jan.	1	" Interest on principal (\$48,721.04) to date, 4 mo's,	974	42
			\$50,669	88
		Deduct cash then paid by guardian,	31,980	52
			18,689	36
Mar.	1	" Interest on \$18,689.36 to date, two months,	186	89
			18,876	25
		Deduct cash then paid by guardian,.....	10,000	00
		Balance due ward, March 1, 1872, with interest from that date,	\$8,876	25

NOTES ON GUARDIAN'S ACCOUNT.

(a.) Interest is allowed on these several items of disbursement and receipt, notwithstanding the general rule to the contrary, because the sums are so considerable that it would be a hardship upon the parties severally to postpone an allowance of interest until the end of the year, when the balance is struck. See *Ante*, p. 486.

In actual settlements there would hardly be so free a departure from the general rule, partly because the separate items would seldom be so large, and partly because the aggregate of gains on either side by such computations of interest would generally be insignificant.

A careful survey perhaps would show ground of *exception* to the account for allowance of interest in some instances, (as in the *second year*), and for not allowing it in others, (as in respect to the \$800 received in the second year.)

(b.) The principal is here discriminated from the interest, because, although in pursuance of the statute (V. C. 1873, ch. 123, § 10; V. C. 1887, ch. 116, § 2606; *Ante*, pp. 486-7), the guardian, supposing him to retain the money himself, pays interest on interest to the ward, yet the guardian is not himself allowed compound interest as against the ward.

(c.) In this third year of the guardianship, the balance shifts from the side of the guardian to that of the ward, and remains in his favor until the end.

(d.) Only *thirty days* are allowed by statute (V. C. 1873, ch. 123, § 12; V. C. 1887, ch. 116, § 2608) to the guardian to invest money, and he "shall not be charged with interest thereon until the expiration of said time, unless he shall have made the investment previous thereto." (*Ante*, p. 486.) But if he retains the money in his own hands, he is to be charged interest thereon from the day of its receipt, and not from the end of the thirty days allowed for investment. (*Snively v. Harkrader*, 29 Grat. 112.)

(e.) Here, although the balance with which the year begins consists largely of *interest and of estimated profits*, yet interest is by statute (V. C. 1873, ch. 123, § 10; V. C. 1887, ch. 116, § 2606) allowed thereon throughout the year. Where (as happens in the fifth year, 1869-70), the guardian does not keep the balance himself, but *invests or loans it*, under the direction of the court, he is not to be charged with interest, unless and until he receives it. (*Ante*, p. 486.)

(f.) The guardian is allowed by statute (V. C. 1873, ch. 123, § 11; V. C. 1887, ch. 116, § 2607) to recover *compound interest* on "bonds" payable to him as guardian. (*Ante*, p. 486.)

(g.) When the wardship terminates, as in this case it is supposed to do, just here (Sept. 1, 1871), the account is thenceforward adjusted on the principles applicable to ordinary *debtor and creditor* (*Ante*, p. 487); that is, the interest is computed upon the principal sum due to the ward to the time of the first payment, and that, together with the previously accrued interest being added to the principal, the payment is deducted from the aggregate, and if the payment exceeds the interest accrued, interest is computed on the remainder, until the next payment; and being added to the principal, the payment is deducted from the aggregate; and on the remainder as a new capital, interest is again computed, and so on until the demand is extinguished, or the account closed; the principle being to consider every payment as applicable, first to extinguish *all the accrued interest*, and the balance only as going to diminish the principal sum. And hence, when the payment is less than the interest which has accrued, the interest is to be computed for the next period, down to the ensuing payment, on the *preceding principal sum* (*Lightfoot v. Price*, 4 H. & M. 431, 432; *Story v. Livingstone*, 13 Pet. 371; *U States v. McLemore*, 4 How 286; 2 Pars. Cont. 147.) But this rule is not to the prejudice of any agreement of the parties to apply the payment to the principal, and not to the interest; so that if the guardian make a *voluntary payment* to the ward *after he attains his age*, and stipulate at the time that it shall be applied to principal, if the ward receives it, he must so apply it. (*Story v. Livingstone*, 13 Pet. 371; *Connecticut v. Jackson*, 1 Johns. Ch. R. (N. Y.) 17; *Dean v. Williams*, 17 Mass. 417; *Lightfoot v. Price*, 4 H. & M. 431; *Pindall's Ex'x v. Bank of Marietta*, 10 Leigh. 484; *Miller v. Trevillian & als* 2 Rob. 1.)

See "Matthew's Guide to Commissioners," 30, et seq., 38, et seq.; a book which a Virginia practitioner at least can hardly dispense with.

51. The Termination of the Guardianship.

The wardship, as we have seen, may be terminated by the ward's or by the guardian's *death*; by the guardian's *resignation* of his trust; by his *removal* from it by the court which appointed him or by any court of chancery; by the minor, *if a male*, attaining the *age of twenty-one*, or if a *female* (in respect to her person) attaining *that age*, or *marrying*; or in the case of a testamentary ward, by the *expiration of the period* prescribed in the will. (V. C. 1873, ch. 123, § 7; Id. ch. 128, §§ 18, 19; V. C. 1887, ch. 116, § 2603; Id. ch. 121, §§ 2687 to 2689; *Ante*, p. 463.)

The marriage of a female guardian may and ought to induce the court of chancery to inquire whether she ought not to be removed, but it does not seem *per se* to operate her removal. Having become guardian when she was *sui juris*, acting according to her own judgment and discretion, when she loses that independent judgment, and becomes liable to be controlled by her husband, it is fitting to *make inquiry* whether it is expedient for the interest of the ward that the wardship will continue. The inquiry may result in showing that the wardship ought to continue, and then the court will continue it accordingly, but it is "quite of course" upon the suggestion of the marriage to make the inquiry. (1 Br. H. & W. 17; Anon. 8 Sim. (11 Eng. Ch.) 346; *Ex parte*, Gornall, 1 Beav. (17 Eng. Ch.) 348.)

2^e. The Doctrine Touching the Capacities and Incapacities of Infants.

In expounding the doctrine touching the capacities and incapacities of infants, we must have regard to, (1), The ages at which, respectively, infants are capable for divers purposes; (2), The precise time when an infant attains the age of twenty-one years; and (3), The doctrine touching the privileges and disabilities of infants.

W. C.

1st. The Ages at which, respectively, Infants are Capable for Divers Purposes.

Purposes for which an Infant's capability comes into question.	Doctrine at Common Law as to		Doctrine in Virginia.
	Males.	Females.	
For Betrothal	7	Same.
" Crime (if discretion proved),	7	7	Same.
" Dower	9	Same.
" Oath of Allegiance	12	Same.
" Assent to Marriage	14	12	Same.
" Crime, (fully <i>Capax Doli</i>) ..	14	14	Same.
" Will of Chattels	14	12	18, (V. C. 1873, ch. 118, § 3; V. C. 1887, ch. 112, § 2513.)
" Choosing Guardian	14	14	Same.
" Acting as Executor	17	17	21, (V. C. 1873 ch. 126, § 1; V. C. 1887, ch. 119, § 2636.)
" Full Age	21	21	Same.

The two diversities between the doctrine in Virginia and at common law are seen from the table, namely, as to the age of making a *will of chattels*, which in Virginia is eighteen in both sexes; and of *acting as executor*, which, with us, is twenty-one, because the statute (V. C. 1873, ch. 126, § 1; V. C. 1887, ch. 119, § 2636), forbids that one shall act as executor without *giving bond*, which no one can do legally under the age of twenty-one.

Full age, in man or woman, is twenty-one, and until that time the person is styled *an infant*. This period is merely arbitrary, and is dependent on the positive law of each country. England, Scotland, and the English colonies and dependencies everywhere fix it at twenty-one; but in Naples full age is eighteen; in France, with regard to marriage, thirty; and in Holland, twenty-five. (1 Bl. Com 464; 2 Steph. Com. 331-'2.)

These diversities give rise to questions as to the validity of acts done and contracts made, as between different countries, where the period of full age is not the same. And the rule upon that point is that the *lex loci contractus* determines the validity or invalidity of the transaction; that is, the law of the place where (or, perhaps, rather with *reference to which*), the contract is made, or the act done. Hence, a person who, by the law of his domicile, is a minor until twenty-five, and so is incapable of making a valid contract there, may, nevertheless, in another country (or, perhaps, by making a contract to be performed in another country), where the full age is twenty-one, generally make a valid contract at that age, even a contract of *marriage*. (Stor. Conf. L. §§ 103, 291, &c.; 2 Kent's Com. 458; Male v. Roberts, 3 Esp. 164; *Ex parte*, Lewis, 1 Ves. Sr. 297.)

2^d. The Precise Time when an Infant Attains the Age of Twenty-one Years.

By the common law, the *precise period* when one attains the age of twenty-one years is *on the first moment* of the twenty-first anniversary of his birth; for the law in general admits no fraction of a day (Sir Robert Howard's Case, 2 Salk. 625; S. C. 1 Ld. Raym. 480); and the doctrine of Blackstone and his annotator (1 Bl. Com. 463, & n. (12).) that full age is attained on the first moment of the *day preceding* such anniversary, depends on *dicta* only, is contrary to reason and good sense, is capable (by going back one day at a time) of being refuted by the *reductio ad absurdum*, and is at war with the only direct adjudication on the subject, (Sir Robert Howard's Case just mentioned.)

The confusion of thought in reference to the subject seems to arise from not distinguishing between the *last moment* of the day preceding the twenty-first anniversary of birth, and the *first moment* of the anniversary itself.

Hence, it becomes customary to say, loosely, that the infant attains his age *on* the last moment of the day preceding, when, in fact, it is not so until that last moment *is past*, and the first moment of the next day is begun. The conclusion is then drawn from this unwarranted assumption, that as the law knows no fraction of a day, the infant is of age on the *first moment* of the day preceding the twenty-first anniversary of birth. But it is apparent that, if it is allowable to confound thus the first moment of the anniversary with the last moment of the day preceding, it is, by parity of reason, in like manner allowable to confound the first moment of such preceding day with the last moment of the day before that; and thus, as no fraction of a day is acknowledged, the party is of age on the first moment of this last named day, and by parity of reason, on the first moment of the day before that, etc., thus, it is apprehended, reducing the proposition to an absurdity.

The citations in 1 Bl. Com. 463, n. (12), all refer to the same case—Herbert v. Tarbol—which is reported most at large in 1 Keb. 589. The proposition is a mere *dictum*, not necessary to the decision of the case, nor, so far as appears, involved in it at all; and although not denied (for there was no occasion to contest it), was stated by only two of the four judges. In the case as reported in Raym. 84, the *dictum* is wholly omitted.

The doctrine is repeatedly mentioned afterwards, as by Lord Holt in Fitzhugh v. Dennington, 2 Ld. Raym. 1095, and by the court of C. B. in Roe v. Hervey, 3 Wils. 274, but always by way of illustration only, without any direct adjudication of the point.

3^d. Doctrine Touching the Privileges and Disabilities of Infants.

The very *disabilities* of infants are *privileges*, intended for their *benefit and protection*. We shall see what they are by observing, (1), The doctrine touching an infant's suing or being sued; and (2), The doctrine touching the privileges and disabilities of infants in relation to property and contracts;

W. C.

1st. Doctrine Touching an Infant's Suing or Being Sued.

The doctrine touching an infant's suing or being sued, etc., may be contemplated with reference to, (1), Infants suing; (2), Infants being sued; (3), Staying proceedings in suits by reason of defendant's infancy; (4), Effect of judicial proceedings in respect to infants; and (5), Infant's responsibility for crime;

W. C.

1^h. Doctrine as to *Infants Suing*.

An infant sues *in his own name* like an adult, but as he cannot appear *by attorney* (for want of discretion to

choose one), he sues under the protection of his *next friend*, or *prochein ami*. (1 Bl. Com. 464; 1 Rob. Pr. (1st ed.) 122-'3; Bac. Abr. Infancy, (K.) 1, 2; 1 Am. L. C. 264; V. C. 1873, ch. 123, § 14; V. C. 1887, ch. 116, § 2614; Lemon v. Harnsberger, 6 Grat. 305.)

At common law, an infant can in no case appear, either as plaintiff or defendant, except by *guardian*. The employment of the *prochein ami*, or next friend, arose out of the Statutes of Westm. I., c. 48 (3 Edw. I.), and Westm. II., c. 15 (13 Edw. I.), being found more convenient than suing by guardian, because the infant was not obliged to be in court when the *prochein ami* was admitted. In Virginia, in practice, infants never sue by guardian, it being provided by our statutes (V. C. 1873, ch. 123, § 14; V. C. 1887, ch. 116, § 2614,) that "any minor entitled to sue may do so by his next friend."

The *prochein ami* ought to be a person of some substance, because he is answerable for the costs of the suit, and *possibly* may be entitled to receive what may be recovered therein. In *Brooking v. Dudley*, decided by the general court (composed of the governor and council) in 1737, and reported in Barradall's M. S. Rep. 239, (cited 1 Rob. Pr. (1st ed.) 123), it was held that payment to the next friend was valid. If this proposition be law, it is certainly proper, as Mr. Robinson remarks, that more caution should be exercised in admitting persons to act as *prochein ami*. It is believed, however, to be without any adequate foundation of authority, and is certainly opposed to sound policy, and to the general analogies of the law, which does not usually commit the pecuniary interests of infants to persons who have given no security therefor, not even to the father. See Bac. Abr. Infancy, (K.) 2; *Turner v. Turner*, 2 Stra. 708; *Squirrel v. Squirrel*, 2 P. Wms. 297, n. (1), notes to *Turner v. Turner*. The money recovered by the infant, it would seem, should be paid to the infant's guardian, and if he has none, one must be appointed for the purpose; but the execution would, it is supposed, be in the name of the infant. (Bac. Abr. Execution, (A.) & (F.); 2 Tuck. Com. 339 & seq.; *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10; [30 Am. Dec. 426, 427].)

If the infant appears *by attorney*, the statute of *jeofails* (V. C. 1873, ch. 177, § 3; V. C. 1887, ch. 169, §§ 3449), cures the error where the verdict (if there be one), or the judgment, or decree is *for him, and not to his prejudice*.

An infant is not liable *personally* for costs, unless he prosecutes the suit after he comes of age, but the *prochein ami* alone is responsible; but the latter may indemnify himself out of the infant's estate, unless it appear that he acted without due regard to the infant's interests. (Bac.

Abr. Inf'y, (K.) 2; Mitf. Eq. Pl. 26; Burwell, &c. v. Corbin & als. 1 Rand. 151; 1 Am. L. C. 264; Turner v. Turner, 2 P. Wms. 297 '8; Pearce v. Pearce, 9 Ves. 548.)

Infants have the same right as adults to sue for any injury to person or property, the suit with us being brought by the *prochein ami*, or next friend, but in the infant's name. And in general the ordinary principles of law govern such actions, except in so far as they may be modified so as to be adapted to the immaturity of discretion in infants. Thus, if an adult complains of a tort inflicted upon him, and it appears that but for *his own negligence* the injury would not have occurred, any action that he may have brought is barred by such *contributory negligence*, as it is called. (Tuff v. Warman, 5 Com. B. (N. S.) 585; (94 E. C. L.) 584; Bridge v. Grand Junction R. R. Co. 3 M. & W. 246; Davies v. Mann, 10 M. & W. 548; Indianapolis v. R. R. Co. 93 U. S. 291; R. R. Co. v. Jones, 95 U. S. 439; Cool. Torts, 674 '5, and cases cited.) But it is settled law that a child is held to such discretion and care only as may be reasonably expected from children of his age, and therefore children too young to be *sui juris*, cannot be held responsible for contributory negligence; and still less can the contributory negligence of the parent avail against an action by the child or his personal representative. (10 Am. & Eng. Encyc. of Law, 675 Tit. Infants; N. & W. R. R. Co. v. Groseclose, Va. Law Jour. Sept. 3, 1891, p. 647.)

The rule may be laid down generally that the age, the capacity and discretion of a child to observe and avoid danger are questions of fact, to be determined by the jury; and his responsibility is to be measured by the degree of capacity he is thus found to possess. Hence a person injuring a child may be held responsible under circumstances where an adult would not have recovered (Ibid.)

Where, on the other hand, the infant is a mere trespasser, and is injured in consequence of his trespass, he is in general without redress; but the courts in such cases are lenient to infants, and not only require that the injury shall occur by no default of the adult, in order to relieve him of liability, but also allow a remedy to the infant, if the thing causing the injury is such as naturally to attract children, and is left exposed and unguarded, as in the case of railroad turn-tables, where infants have been allowed to recover for injuries received at them, where they were left unfastened and open to public access. (Ibid.)

Whether an infant is personally chargeable with the negligence or other faults of his guardian or protector, is as yet an unsettled question. It is held in New York,

Massachusetts, Indiana, and perhaps in other States, that he is so responsible. (Hartfield v. Roper, 21 Wend. 615; Holly v. Burton Gas Co. 8 Gray, 128; Callahan v. Bean, 9 Allen 401; Pittsburgh & R. R. Co. v. Vering, 27 Md. 513); whilst in Pennsylvania, Ohio and Connecticut, the doctrine that the negligence of the parent or guardian is to be imputed to the child is distinctly repudiated. (North Penn. R. R. Co. v. Mahoney, 57 Pa. St. 157; Smith v. O'Connor, 48 Id. 218; Bellefontaine, &c., R. R. Co. 18 Ohio St. 399; Daley v. Norwich, &c., R. R. Co. 26 Conn. 591; Robinson v. Cone, 22 Vermt. 213.)

See Shearm. & Redf. on Negligence, §§ 48 & seq.; 10 Am. & Eng. Enc. of Law, 676, Infants; R. R. Co. v. Gladman. 15 Wal. 408.

2^h. Doctrine as to Infants being Sued.

The broad principle, both of law and equity, is that, except when it is otherwise provided by statute, decrees and judgments are binding only on the parties to the proceedings, and those claiming under them. Against all other persons they are *res inter alios actæ*, and void. Hence a decree determining the rights of infants cannot be made until they are brought before the court by *due service of process* upon them. Nay, without such service of process, there cannot be even the appointment of a guardian *ad litem*. (Hunter v. Hatton, (4 Gill. (Md.) 115), 45 Am. Dec. 121; Coleman v. Coleman, (3 Dana (Ky.) 398), 28 Am. Dec. 93; Galpin v. Page, 18 Wal. 373.) This appears to be the prevailing doctrine in the U. States, as it is certainly the doctrine of reason and justice, but not without some dissent. See 10 Am. & Eng. Enc. of Law, 689, Tit. Infants; Id. p. 690; 7 Rob. Pract. 53, &c.

An infant is sued *in his own name*, like an adult, but he cannot defend the suit *by attorney* (for want of discretion to select one), but must do so, in a civil case, by guardian *ad litem*. (Bac. Abr. Inf'y, (K.) 2; Id. Guardian, (A.) 4; 1 Rob. Pr. (1st ed.) 172-'3; Roberts v. Stanton, 2 Munf. 129; Brown v. McRea, 4 Munf. 439; Beverleys v. Miller, 6 Munf. 99; Word's Case, 3 Leigh, 743.) In a *criminal* prosecution he must appear like an adult, *by attorney, or in person*. (Word's Case, 3 Leigh, 759.)

A guardian *ad litem* is appointed by the court, or by the judge in vacation, or by the clerk in vacation. He must be a discreet and competent attorney at law, or if no such attorney will serve, then some other discreet person, who it would seem, however, is not compellable to serve, and is not liable for costs, and is to be allowed a reasonable compensation for any substantial service that he may render, and also his actual expenses, to be paid

out of the estate of the defendant. (V. C. 1873, ch. 167, § 17; V. C. 1887, ch. 159, § 3255; *Wells v. Winfree*, 2 Munf. 342.)

An infant is never to be prejudiced by any act, default or admission of his guardian *ad litem*. (Bac. Abr. Guardian, (A.) 4; *Bank of Alexandria v. Patton*, 1 Rob. 500.)

If an infant defendant appear *by attorney*, the error is cured by the statute of *joinders*, (V. C. 1873, ch. 177, § 3; V. C. 1887, ch. 169, § 3449); if the verdict, judgment or decree is *for him, and not to his prejudice*.

3^b. Doctrine as to *Staying Proceedings in Suits* because of the Infancy of Defendant.

The stay of proceedings because of the defendant's infancy is called *parol demurrer*, which means the *stay of pleadings*. It occurred at common law wherever the proceeding was liable to affect the title to an infant's lands. In Virginia it is done away with by statute, which requires a guardian *ad litem* to be appointed, whether the infant has been served with process or not, and directs that the suit shall go on. (V. C. 1873, ch. 167, § 17; V. C. 1887, ch. 159, § 3255; Bac. Abr. Inf'y, (L.); 1 Rob. Pr. (1st ed.) 161.)

4^b. Effect of Judicial Proceedings in Respect to Infants.

All courts are particularly charged with the protection of the interests of infants, and on a bill *in equity*, where an infant is plaintiff, will do what is best for him without regard to the prayer of the bill. (*De Manneville v. De Manneville*, 10 Ves. 59.) An infant *as plaintiff* is not personally liable for costs, but his *prochein ami*, or some other person who may have assumed to pay them, is (*Anon.* 1 Wils. 130; *Noke v. Wyndham*, 2 Stra. 694; *Miller v. Smith*, 2 Stra. 932); nor, it would seem, is he liable for costs *as defendant*, although this latter proposition is controverted. (Bac. Abr. Inf'y, (K.) 2.)

In respect to the substance of judgments and decrees, they are as obligatory upon infants, whether plaintiffs or defendants, as upon adults. (1 Dan. Ch. Pr. 205; 4 Min. Insts. 1202; *Harman v. Davis*, 30 Grat. 465.) But in respect to infant defendants, it has always been the practice *in chancery*, in decreeing *against an infant*, to reserve to him *six months after coming of age* to show cause against the decree; and as without such express reservation the decree is, at common law, absolutely binding, it is error to omit the reservation. (*Braxton v. Lee's Heirs*, 4 H. & M. 376; S. C. 5 Call, 453; *Pickett v. Chilton*, 5 Munf. 467; *Brown v. Armistead*, 6 Rand. 602; *Jackson v. Turner*, 5 Leigh, 119; *Tenant v. Patton*, 6 Leigh, 196.)

The only exception to this doctrine is where lands are

sold in order to make partition of the proceeds, where, by the tenor of the statute (V. C. 1873, ch. 120, § 3; V. C. 1887, ch. 114, § 2564) the infant *is allowed no day to show cause*. (Parker v. McCoy, 10 Grat. 594.)

The reservation being often omitted, and thereby decrees vitiated, a statute was passed (V. C. 1873, ch. 174, § 10; V. C. 1887, ch. 167, § 3424) declaring that infant defendants shall be allowed to show cause against decrees within six months after coming of age, whether leave be reserved in the decree itself or not, and indeed dispensing with such express reservation.

The cause to be shown must be such as exists at the *time of the decree*, and not such as may arise afterwards. (Walker v. Page, 21 Grat. 636.)

5^h. Doctrine as to Infant's Responsibility for Crime.

Under seven, an infant is wholly incapable of crime, and is not amenable to legal punishment. Between seven and fourteen he is *capax doli* only upon positive proof of intelligence sufficient rightly to apprehend the guilt of the act in question. Over fourteen, he is as amenable to punishment as an adult. (1 Bl. Com. 464-'5; Bac. Abr. Inf'y, (H.); 1 Am. L. C. 264; Word's Case, 3 Leigh, 759; Crim. Synops. 8, 233.)

2^g. Doctrine Touching Privileges and Disabilities of Infants in Relation to Property and Contracts.

As a general rule, no neglect to claim or to sue will bar an infant of his rights by *mere lapse of time*. (1 Bl. Com. 465; 2 Steph. Com. 333-'4; 1 Th. Co. Lit. 179-'80, and n. (M.); V. C. 1873, ch. 146, §§ 4, 5, 18; V. C. 1887, ch. 139, §§ 2917, 2918, 2931, 2938.) But the practical application and effect of that proposition must be studied in the light of the statute of limitations, just referred to.

Let us consider under this head, (1), The doctrine touching the privileges and disabilities of infants in relation to the *disposition of property*; and (2), The doctrine in relation to the privileges and disabilities of infants *touching contracts*;

W. C.

1^h. Doctrine Touching Privileges and Disabilities of Infants, in Relation to the *Disposition of Property*.

An infant cannot in general aliene, or contract to aliene, or to do any other act which is binding, relative to his property; all transactions of that sort being *voidable* by him on his coming of age. But this principle is not without several exceptions. Thus, an infant may make a valid *will of chattels* at eighteen (V. C. 1873, ch. 118, § 3; V. C. 1887, ch. 112, § 2513); may at any age assign dower to his ancestor's widow, or make partition with some other joint owner, or may agree to do it, because he is

compellable by suit to do both; may, under the direction of the court of chancery, *execute trusts*, or rather *may have them executed* (V. C. 1873, ch. 174, § 7; Id. ch. 124, § 1; V. C. 1887, ch. 167, § 3418; Id. ch. 117, § 2615); may execute a power of appointment *simply collateral*; that is, where he has himself no interest; and may act as *agent or attorney in fact* for another person. (1 Bl. Com. 465; 2 Min. Insts. 136, 439; 1 Th. Co. Lit. 74, n. (35); 1 Sugd. Pow. (3d Am. ed.) 211; 2 Do. 537.)

2^h. Doctrine Touching Privileges and Disabilities of Infants, *in Relation to Contracts Executory*.

There is a great want of precision in the doctrines scattered through the books, on the subject of the validity and effect of the contracts of infants. The result of them is very satisfactorily summed up by *Lord Ch. J. Eyre*, in *Keane v. Boycott*, 2 Hen. Bl. 511, as follows, namely: that all the contracts of which the court can pronounce that it is *for the benefit of infants* to allow them to bind themselves by them, *are valid*; that all of which the court can in like manner pronounce that to allow infants to be bound thereby would be *to their prejudice*, *are void*; and that those of which nothing certain can be predicated, as to whether it would be hurtful or profitable to infants to allow them to be bound thereby, *are voidable at the infant's election*. (2 Steph. Com. 335; 2 Kent's Com. 236, 243; *Zouch v. Parsons*, 3 Burr. 1801; *Keane v. Boycott*, 2 Hen. Bl. 511.)

Lord Mansfield's masterly exposition in the noted case of *Zouch v. Parsons*, 3 Burr. 1801, of the general considerations applicable to infant's contracts, though neither so comprehensive nor so practical as that of Lord C. J. Eyre, is worthy to be transcribed:

"Miserable must be the condition of minors," says he, "excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages, if they could do *no* binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts *for their own benefit*, and, without prejudice to themselves, for the *benefit of others*."

He then proceeds to mention "a rule or two," the reasons of which were applicable to the case before him, viz.:

1st, If an infant does a right act which he *ought to*, which he was *compellable* to do, it shall bind him, as if he *make equal partition*; if he *pays rent*, &c.; for which and other similar instances the decisive reason is that

“whatsoever an infant is *bound to do* by law, the same shall bind him, albeit he doth it without suit of law;” and it is immaterial by what method he is compellable, whether by the ecclesiastical or temporal courts.

2dly, The acts of an infant which *do not touch his interest*, but take effect from an authority with which he is entrusted, are binding; as when an infant *head of a corporation* joins in corporate acts, an infant officer does the duty of his office, an infant agent fulfils his agency, &c.

3dly, From the nature of the infant's privilege, it is given as a shield to protect himself, and not as a *sword* to make aggressions upon others; and therefore it is never to be turned into an *offensive weapon* of fraud or injustice.

In the further prosecution of the subject let us consider, agreeably to Lord Chief Justice Eyre's analysis, (1), What contracts of infants are *valid, void, and voidable*, respectively; (2), What confirmation is requisite and sufficient of such as are *voidable*; and (3), The acts for which infants are liable, notwithstanding their infancy;

w. c.

- 1ⁱ. What Contracts of Infants are *Valid, Void, and Voidable*, respectively; w. c.

- 1^k. Contracts of Infants which are *Valid*.

Such contracts are *valid* as it is *in general beneficial to an infant* to allow him to bind himself by. They consist of *four classes*, viz.: (1), Contracts for *necessaries*; (2) Contracts of *marriage settlement*; (3), Contracts of *apprenticeship*; (4), Contracts to do what the law *would oblige the infant to do* at all events;

w. c.

- 1ⁱ. Contracts for *Necessaries*.

Necessaries are such supplies as are needful to enable the infant to live according to *his real* (not his *apparent*) position in society; and he who undertakes to supply him must determine that at his peril. They include, according to Lord Coke (1 Th. Co. Lit. 175), “necessary meat, drink, apparel, necessary physic, and other such like necessities; and likewise good teaching or instruction, whereby he may profit himself afterwards; as for example, a common school education always, and in some cases perhaps, a collegiate, and in others a professional education, when they can be deemed *necessaries*, and not merely accomplishments. But *mere ornaments*, having no utility, can never be necessities, whatever the infant's fortune. (1 Bl. Com. 466, and notes (16) & (17); 2 Kent's Com. 230; 1 Pars. Cont. 245, and n. (h.), 246, and n. (l); 3 Rob. Pr. (2d ed.) 236; 1 Am. L. C. 249; Peters v. Fleming, 6 M. & W. 47; Middlebury College v.

Grandler, 16 Vermt. 683 (42 Am. Dec. 538-39); Price v. Saunders, 60 Ind. 310; 10 Am. & Eng. Encyc. of Law, 661, Tit. Infants; Gayle v. Hayes, 79 Va. 547.

It seems to be the better opinion, both in England and America, that although the articles supplied be in themselves of the class of necessities, yet if the infant be supplied with them from other sources, he is not liable to pay for them. The tradesman must at his peril discover whether the infant is actually in need of them or not. If he is already, in fact, supplied with such articles, whether by his friends or by another tradesman, there can be no recovery from the infant for the additional supply. (Ford v. Fothergill, 1 Esp. 211; Cook v. Deaton, 3 Carr. & Payne (14 E. C. L.) 114; Story v. Perry, 4 Carr. & P. (19 E. C. L.) 526; Burghart v. Angerstein, 6 Carr. & P. (25 E. C. L.) 690; Steedman v. Rose, 1 Carr. & M. (41 E. C. L.) 422; 3 Rob. Pr. (2d ed.) 233-4; Bac. Abr. Inf. (L.) 1; 1 Am. L. C. 248.)

As to the particular subjects which have been *regarded as necessities*, see 1 Pars. Cont. 246, n. (1). An infant has been held liable for the *heir of servants* adapted to his station, and for the reasonable rent of a suitable dwelling or lodgings (Evelyn v. Chichester, 3 Burr. 1719; Lowe v. Griffith, 1 Scott, 458); an infant captain in the army for a *livery for his servant*, but not for *cockades for his men* (Hands v. Slaney, 8 T. R. 578); nor a naval lieutenant for a *chronometer*, unless it can be proved specially to have been a necessary for *him*, as being the sailing-master of his ship. (Berolles v. Ramsay, 1 Holt. (3 E. C. L.) 77.) A suit of regimentals is a necessary to a militia officer expecting to be called into service (Coates v. Wilson, 5 Esp. 152); but not a racing jacket to anybody *but a jockey*, nor a waistcoat at *eleven guineas* to a minor of any station in life whatsoever (Burghart v. Angerstein, 6 Carr. & P. (25 E. C. L.) 690); nor horses, saddles, harness and gigs to an Oxford student, the son of a gentleman of fortune (unless upon special circumstances of health, &c.), although the youth kept a horse, and sometimes hunted with his father's hounds (Harrison v. Fane, 1 Mann. & Gr. (39 E. C. L.) 550); nor a stanhope for the son of a clergyman of small fortune (Charters v. Bayntern, 7 Carr. & P. (32 E. C. L.) 52); nor a silk dress for a female servant (Hedgeley v. Holt, 4 Carr. & P. (19 E. C. L.) 104); nor soda-water, oranges, jelly, biscuit and pastry for a university student, unless under special circumstances of health or other peculiar necessity (Brooker v. Scott,

11 Mees. & W. 67); nor articles supplied to an undergraduate at Oxford, the son of a man of position, for *dinners* in his own rooms (where he received parties of friends); nor fruit, confectionery, etc., furnished the same party (Wharton v. McKenzie, 5 Ad. & El. N. S. (48 E. C. L.) 606.) We have seen that such articles as are *merely ornamental* are never necessities for any one, whatever his wealth or station. To this class *finger-rings* have been held to belong, whilst a watch, watch-chain, and breastpin, even though very expensive, have been regarded as having so much utility as to constitute them necessities, when they are adapted to the station and fortune of the infant purchaser. So that the practical question is, whether the articles were bought for *mere ornament*, or for *real use*. If the former, the infant can in no case be subjected to pay for them; if the latter, he may be, provided they are in character and cost adapted to his means and station. (Peters v. Fleming, 6 M. & W. 47; 3 Rob. Pr. (2d ed.) 236; 10 Am. & Eng. Encyc. of Law, 661 & seq.; Tit. Infants.)

Money lent to an infant to buy necessities, although it *be so expended*, is yet not recoverable *at law* (because the law distrusts his discretion to lay out the money judiciously); but *equity* will *subrogate* (*i. e.*, substitute) the lender to the right of him who furnished the necessities, who was paid with the lender's money. (1 Bl. Com. 466, n. (17); 1 Chit. Cont. (11 Am. ed.) 207; Marlow v. Pitfield, 1 P. Wms. 559; 1 Am. L. C. 249.) And as an infant is not liable at law for money lent him to buy necessities, because he has not sufficient discretion to apply it judiciously, so *a fortiori* is he deemed incompetent to conduct any business, and, therefore, is not liable for goods furnished for that purpose, even though it be a trade by which he gets his living. (1 Bl. Com. 466, n. (17); Bac. Abr. Infancy, (I.) 1; 1 Am. L. C. 249.)

And upon like considerations, an infant, in order that he may be effectually protected from wrong, cannot contract to pay even for necessities in such a form as will preclude inquiry into the price and value of the consideration. He cannot, therefore, make any bargains for a price which shall bind him *absolutely*. Whatever form the contract may assume, whether that of a bond, of a promissory note, or of an account stated, it is to be regarded in law as no more than an engagement to pay the *true value* of the articles, etc. It has, therefore, been sometimes said that no action will lie against an infant on *any security*, although the

consideration was *necessaries*. This, however, appears to be a misapprehension. The true doctrine is believed to be that the action may be maintained on the security; and if infancy is pleaded and proved, nothing can be recovered but the *just value of the necessaries*. (1 Pars. Cont. 260 '61; Bac. Abr. Infancy, (I.) 1; 1 Am. L. C. 248.) Although prudence would suggest the insertion in the declaration of a separate *count* for the *value* of the necessaries. (*Post*, p. 517.)

An infant is as much liable for necessaries furnished persons for whom he is legally bound to provide, as for those furnished to himself, as his *wife and children*, etc. But he is not liable for necessaries for a wife, bought by him *before marriage*, although his wife afterwards used them. (1 Bl. Com. 466, n. (16); Turner v. Trisby, 1 Stra. 168; 2 Kent's Com. 240; Chapple v. Cooper, 13 M. & Wels. 252, 259-'60.) In the case last mentioned of Chapple v. Cooper (13 M. & W. 252, 259-'60), a remarkable illustration of this principle was afforded. An infant widow ordered a funeral for her husband, who died without property; but the undertaker having delayed for a time to present his bill, her grief and respect were so mitigated that she refused to pay it; whereupon he brought an action, and it was held that *she was liable*, because being by the law made, through the marriage, *one with the husband*, and a decent burial being a necessary for him, it was a *personal benefit to her*? It is another noteworthy corollary from this proposition, that if an infant marries a wife who is indebted, he becomes by the marriage liable in law (*i. e.*, by the common law) for all her ante-nuptial debts, against which his infancy constitutes no defence. (1 Pars. Cont. 245, and n. (j).) But by the Married Woman's Law, with us it is expressly declared otherwise. (V. C. 1887, ch. 103 § 2290.)

Where an infant lives with, or under the control of his parent or guardian, no credit is ever *implied* as *given to him*. It is presumed to have been given to the parent or guardian, and in order to charge the infant, it *must be proved* not to have been given to them, *but to him*. (Bac. Abr. Infancy, (I.) 1; Bainbridge v. Pickering, 2 Wm. Bl. 1325.)

2^d. Contracts of Marriage Settlement.

Contracts of marriage settlement, so far as they relate to *personal property*, are valid as against *invariant parties* thereto, (1), Because they tend to promote marriage, which is not only advantageous to the State, but eminently favorable to the respectability and hap-

piness of the parties; and (2), Because in the case of *females especially*, they protect (at common law) the property of the party from the *marital rights* of the consort. (1 Pars. Cont. 277-8, and n. (t); Tabb v. Archer, 3 H. & M. 399, 408, 422; Healy v. Rowan, 5 Grat. 430; Milner v. Harewood, 18 Ves. 259, and notes.) But in Virginia, under the Married Woman's Law, this last reason would not be applicable. (V. C. 1887, ch. 103, §§ 2285, 2286.)

Such contracts are to be made always by the infants themselves, and not by their guardians in their behalf, and in the latter case are inoperative and void. (Healy v. Rowan, 5 Grat. 430.)

The validity of marriage settlements by infants *touching lands* is not fully determined in England, although no doubt seems to be allowed in Virginia that such settlements *are valid*. (Atherley, Marr. Settlements, 28, &c.; Milner v. Harewood, 18 Ves. 259, and notes; 1 Pars. Cont. 277, n. (t); Tabb v. Archer, 3 H. & M. 399; Healy v. Rowan, 5 Grat. 430.)

31. Contracts of *Apprenticeship*.

As an infant may bind himself to pay "for good teaching or instruction, whereby he may profit himself afterwards," it would seem that he must be bound by a contract of apprenticeship, being peculiarly beneficial to him in its general nature, and so it seems to be admitted. (Baxter v. Burfield, 2 Stra. 1266; Cooper v. Simmons, 7 H. & N. 717. & seq.) But it is held, notwithstanding, that independently of statute, no action of *covenant* lies, nor any other action, nor any remedy in equity *against him*, upon the indenture of apprenticeship; and the only *judicial* remedy open to the master for a breach by the infant of the contract, appears to be by action of covenant against the *infant's friend*, who commonly joins in the indenture, or by an appeal to the statutory *police* jurisdiction of the county court, which has power (V. C. 1873, ch. 122, § 12; V. C. 1887, ch. 115, § 2592) to compel the infant specifically to fulfil his contract of service. (Bac. Abr. Master, &c. (B.) 1; 1 Th. Co. Lit. 175, 177, & n. (40); Gylbert v. Fletcher, 4 Cro. (Car.) 179; King v. Cromford, 8 East. 26; 1 Am. L. C. 232-3; 1 Pars. Cont. 262, n. (e).)

In Virginia it is expressly declared by statute (V. C. 1873, ch. 122, § 15; V. C. 1887, ch. 115, § 2595) that "if an apprentice bound in this State desert the service of his master, he shall be liable, *notwithstanding his infancy*, for all damages sustained by such desertion." But as under the corresponding statute of

5 Eliz. c. 4, § 43, it was held that no remedy lies against an infant *upon the covenants* contained in the *contract of apprenticeship*. (Gylbert v. Fletcher, 4 Cro. (Car.) 179; Bac. Abr. Master, &c. (B.) 1.) It is not improbable that a similar construction will be given to our statute in Virginia. See *Ante*, 203.

Contracts of service not amounting to apprenticeship are, like the great body of infant's engagements, *voidable* at the infant's election. (Moses v. Stevens, 2 Pick. (Mass.) 332; Nickerson v. Easton, 12 Pick. 110.)

4th. Contracts to do what the *Law Obliges the Infant to do* at all Events.

Such a contract is beneficial to the infant inasmuch as it may exempt him from the annoyance of a suit, and sometimes from pecuniary costs. "Whatsoever," says Lord Coke, "an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." (1 Th. Co. Lit. 176-7; 1 Paus. Cont. 263; 1 Am. L. C. 249-50.)

To this class belong assignments of dower by infant heirs, and partitions between co-parceners (co-heirs), or other co-tenants who are compellable to make partition, all of which are binding upon infants, provided they are fair and reasonable. (2 Min. Insts. 136, 439; Zouch v. Parsons, 3 Burr. 1801, 1803, 1808; Baker v. Lovett, 6 Mass. 80; Vent v. Osgood, 19 Pick. 575; 1 Am. L. C. 250.)

Upon this principle, also, contracts to perform *military service* for one's country are binding on infants. Every one physically capable is bound in law, as in duty, to serve his country as a soldier, when required or invited so to do, and therefore, if the act of the legislature, under which the enlistment is made, *does not except minors*, any one, though a minor, who accepts the offers of the State is *himself* bound thereby; however, a third person, such as the master, if the minor be an apprentice, may intervene, and insist upon his prior claim to the infant's services. (United States v. Cottingham, 1 Rob. 615; United States v. Blakenay, 3 Grat. 405; United States v. Lipscomb, 4 Grat. 41; 1 Am. L. C. 250.)

Upon like principles an infant is liable upon a *bastardy bond*; and so where a father purchased land in the name of his infant son, in order to defraud his creditors, and afterwards sold it to a purchaser for valuable consideration without notice, to whom the infant, at his father's instance, conveyed the legal title, it was held that after age he could not avoid his

conveyance, because having nothing but the legal title, and no equity, as against a creditor or an innocent purchaser for value, he had, by his conveyance, done merely what a court of equity would have compelled him to do, and which, if it were disaffirmed by him, he would be compelled to do again. (1 Pars. Cont. 263; 1 Am. L. C. 250; *People v. Moores*, 4 Denio, (N. Y.) 519; *Elliott v. Horne*, 10 Ala. 348, 353.)

Hence, also, as we have seen, an infant husband is, at common law, liable for his wife's *ante-nuptial* contracts, it being the *legal result* of the marriage. (Bac. Abr. Inf'y, (L.) 3; *Slocombe v. Grubb*, 2 Bro. C. C. 551; *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Butler v. Breek*, 7 Met. (Mass.) 164.)

2^k. Contracts of Infants *which are Void*.

Contracts which it is *prejudicial to infants, in general*, to allow them to bind themselves by *are void absolutely*. And this is determined by the *nature of the contract in general*, and not upon any accidental circumstances of loss or profit connected with the transaction, much less upon the wishes of the minor himself.

Formerly this class was considered to include all *powers of attorney*, all contracts involving *penalties and forfeitures*, all *releases and conveyances* executed to *guardians*, all *negotiable securities*, and all *accounts stated*. (2 Kent's Com. 235; 1 Pars. Cont. 621; 1 Th. Co. Lit. 175; *Zouch v. Parsons*, 3 Burr. 1804; *Trueman v. Hurst*, 1 T. R. 40; *Williamson v. Watts*, 1 Campb. 552; *Swansey v. Vanderheyden*, 10 Johns. (N. Y.) 33; *McMinn v. Richmond*, 9 Yerg. (Tenn.) 1); but a very decided tendency exists to circumscribe the number of instances of *void contracts*, and to hold them rather to be *voidable* at the infant's election, especially as, if they are *void*, they are, upon the principle of a *want of mutuality* (mutuality being a necessary element in every contract), as much void in respect to the opposite party as to the infant; whereas, if treated as *voidable*, the minor, at his option, may avoid them after coming of age, whilst the adult party is bound; and hence it is better *for the infant* that the contract should be voidable than void. In view of these considerations, it is believed that at present none of an infant's transactions are *absolutely void* except *powers of attorney*, including *agencies of all sorts*, sought to be created by minors. (*Mustard v. Wohlford*, 15 Grat. 337; *Zouch v. Parsons*, 3 Burr. 1806; *Williams v. Moor*, 11 Mees. & W. 266; *Thomas v. Roberts*, 16

Mees. & W. 780-'81, and cases cited in note; 1 Am. L. C. 250-'51.)

The reason for holding *powers of attorney* and agencies to be *absolutely void*, instead of merely voidable, may be seen, 1 Am. L. C. 250. It is refined, and not wholly satisfactory; but whatever may be thought of the considerations suggested as the foundation of the rule, the rule itself is believed to be established by a conclusive weight of authority. The reason is stated thus: the constituting of an attorney by one whose acts are, in their nature, voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess,—that of doing valid acts. If the acts, when done by the attorney, remain voidable in the option of the infant, the power of attorney is not operative according to its terms; if they are binding, then he has done, through the agency of another, what he could not have done directly,—binding acts. The fundamental principle of law, in regard to infants, requires that the infant should have the power of affirming such acts done by the attorney as he chooses, and avoiding *others* at his option; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney; and if he ratifies the power, all that was done under it is confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with is therefore, in its nature, concluded to be incapable of delegation. Accordingly, a power of attorney by an infant to sell land is *absolutely void* (Lawrence v. McAster, 10 Ohio, 37, 42; Pyle v. Cravens, 4 Littell, (Ky.) 17, 21); and so also is a warrant of attorney to confess judgment; so that a judgment entered upon it will be set aside upon motion. (Bennet v. Davis, 6 Cow. (N. Y.) 393.)

It is important to observe that, although any given assurance *be void*, and much more if it be voidable, if the original consideration were *necessaries*, there may be a recovery at all events on such consideration; and that it is, therefore, expedient in all cases of that kind to have two *counts* (as they are called) *in the declaration*, or complaint; one on the instrument containing the promise, whether bond or note, and the other on the promise which the *law implies* from the consideration of necessities furnished. (2 Kent's Com. 239; Russell v. Lee, 1 Lev. 86; Stone v. Denison, 13 Pick. (Mass.) 7; McMinn v. Richmond, 6 Yerg. 1.)

It is not amiss, in conclusion of this point, to remind the student that by the statute of wills an infant is not empowered to make a will of *lands*, and that such a will is therefore *absolutely void*, and incapable of confirmation, otherwise than by a re-execution after coming of age, with all the ceremonies of an original will, as indeed it is. (V. C. 1873, ch. 118, § 3; V. C. 1887, ch. 112, § 2513; *Herbert v. Tarbol*, 1 Keb. 589; S. C. Sid. 162.)

3^k. Contracts of Infants which are *Voidable*.

Where nothing can, with certainty, be predicated of a class of contracts whether it will be *advantageous or hurtful* to infants to be allowed to bind themselves thereby, they are *voidable* at the election of the infant who makes them, in order that he may have the means of protecting himself against the natural consequences of his inexperience and indiscretion. But until the infant exercises this extraordinary privilege with which the law endues him for his protection, the contract is binding upon him—if that can be called *an obligation* which, when he arrives at age, he may repudiate at pleasure. Were it not so, the contract would be wanting in *mutuality* (which, we have seen, is an essential element of a contract in all cases), and would, therefore, be no more binding on the adult party than on the infant. But that would be contrary to the well-established doctrine which holds such contracts, although they may be voidable by the *infant party*, yet to be always obligatory *upon the adult*. (Bac. Abr. Inf'y, (I.) 4; *Holt v. Clarencieux*, 2 Stra. 937.)

This class of infant's contracts is by far the most numerous of all. It embraces the great bulk of transactions in which either infants or other persons can be engaged—such as bonds *not involving* a penalty or forfeiture, and, according to the later doctrine, such also as do (1 Th. Co. Lit. 176; 2 Kent's Com. 235-'6; *Russell v. Lee*, 1 Lev. 86; *Zouch v. Parsons*, 3 Burr. 1805; *Baylis v. Dinely*, 3 M. & S. 481; *Mustard v. Wohlford*, 15 Grat. 397); promissory notes *not negotiable*, and, by the later doctrine, such also as are negotiable (2 Kent's Com. 235-'6; *Wamsley v. Lindenberger & Co.* 2 Rand. 478); agreements to submit disputes to arbitration; which, however, as partaking of the *nature of powers*, may possibly be held *to be void* (Bac. Abr. Inf'y, (I.) 3; *Warwick v. Bruce*, 2 M. & S. 209); conveyances of lands or chattels (*Zouch v. Parsons*, 3 Burr. 1805; *Baker v. Lovett*, 6 Mass. 80; *Worcester v. Eaton*, 13 Id. 371; *Wheaton v. East*, 5 Yerg. 41; *Mustard v. Wohlford*, 15 Grat. 329); contracts for *personal service*, other

than apprenticeship (*Moses v. Stevens*, 2 Pick. 332; *Vent v. Osgood*, 19 Pick. 572; *Micherson v. Easton*, 12 Pick. 110); contracts *to marry* (*Bac. Abr. Inf'y.*, (I.) 3; *Holt v. Clarendieux*, 2 Stra. 938; *Hunt v. Peake*, 5 Cow. (N. Y.) 475; *Willard v. Stone*, 7 Do. 22); and, in short, the great body of *contracts and assurances* of all kinds (2 Kent's Com. 235-'6; *Oliver v. Hondlet*, 13 Mass. 237; *Whitney v. Dutch*, 14 Id. 257; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539.)

The privilege of an infant to repudiate a voidable contract is a *personal* privilege, confined to himself and his representatives, and of which no one else can take advantage. Thus, if an infant payee of a note endorse it, in an action by the endorsee against the maker, the latter cannot set up, as a defence, the endorser's infancy, as showing that the endorsement conferred no title; nor can the creditors of an infant grantor avoid the conveyance on the ground of the grantor's infancy. (1 Pars. Cont. 207, 276; *Bac. Abr. Inf'y.*, (I.) 6; *Zouch v. Parsons*, 3 Burr. 1807; *Keane v. Boycott*, 2 H. Bl. 511; 1 Am. L. C. 253; *Oliver v. Hondlet*, 13 Mass. 237; *Nightingale v. Withington*, 15 Do. 272, 371; *Kendall v. Lancaster*, 22 Pick. (Mass.) 540.)

And much less can the *other contracting party* elect to avoid the agreement (*Holt v. Clarendieux*, 5 Stra. 937). And, therefore, if one contract with two persons, of whom one is an infant and the other adult, it is not proper to sue the *adult only* (as is the English practice), for that would be for the *plaintiff* to exercise the privilege of avoiding the infant's contract, which the infant alone can do; but both should be sued; and if the infancy of one of the promisors be pleaded and proved, it will not prevent a recovery against the adult. (*Wamsley v. Lindenberger*, 2 Rand. 478; *Woodward v. Newhall*, 1 Pick. 500; 1 Am. L. C. 253.)

And this constitutes a prominent diversity between *contracts voidable* and *contracts void*. Voidable contracts can be avoided by the *infant party alone*, or his representatives, whilst void contracts are no more binding upon the opposite party though adult, than they are on the infant; a consideration which, as already suggested, makes it proper, for the benefit of infants, to incline, in doubtful cases, to the construction that contracts are *voidable* rather than *void*. (2 Kent's Com. 235-'6; *Zouch v. Parsons*, 3 Burr. 1805.)

Since infancy does not generally avoid a contract *absolutely* (as coverture does), it is not in those cases provable under the plea of *non est factum*; but as it enables the infant, at his pleasure, to avoid the demand

it is available under the plea of *non assumpsit* or *nil debet*. (1 Am. L. C. 253; 1 Chit. Pl. 519; Id. 511, 516; Steph. Bl. 162, n. (20).)

2ⁱ. Doctrine as to *Confirmation* of Contracts of Infants.

Confirmation applies not to contracts which are *valid*, for they do not require it; nor to contracts which are *void*, for they are incapable of being confirmed; but it is applicable *exclusively* to contracts *voidable*. (Chit. Cont. 152; Bac. Abr. Infy, (I.) 8.)

The doctrine of confirmation is that, in the case of a *voidable contract*, the infant, either during his minority or within a competent time after he becomes of age, may avoid the contract if he will; or when he reaches the age of twenty-one, if he shall so elect, he may *confirm it*. (1 Pars. Cont. 243, 269 & seq.; Bac. Abr. Infancy, (I.) 8.) He who deals with an infant deals at his peril, and subject to the right of the infant thus to avoid the transaction.

And this right of confirmation or avoidance on the infant's part is paramount and absolute, prevailing not only against the original party on the other side, but also against any one claiming under him, although it be as an innocent purchaser for value. (2 Am. L. C. 259; Mustard v. Wohlford, 15 Grat. 340.)

Nor is the infant's right to avoid the contract affected by the fact that the other party supposed him to be of age; nor that he was engaged in business, and was accustomed to make contracts; nor even that he *fraudulently represented himself* to be of age. (1 Am. L. C. 252.) But in the latter case, although the other party cannot recover *upon the contract*, he may maintain an action *for the fraud*, to which infancy is no defence. (1 Pars. Cont. 265-6; Bac. Abr. Infancy, (I.) 3; Com. Dig. Actions (A. 10); 2 Kent's Com. 241.)

It is not to be understood that because an infant's contract may be *avoided by him*, it is therefore void as to him *until he confirms it*. On the contrary, it is *valid and binding* until he *repudiates it*. Otherwise there would be a want of *mutuality*, which would discharge the opposing adult promisor as well as the infant. The contract is a complete one as soon as made, but with the privilege to the infant, in order that he may protect himself against impositions and his own imprudence, to annul it at his discretion, if he shall elect so to do.

As to the precise *terms of ratification*, the authorities, at common law are so little in accord one with another in respect to the language which shall fix the infant's liability, after coming of age, and determine his election, as to suggest a statutory provision as the best means to

harmonize the doctrine. Such an enactment has been resorted to both in England and in Virginia; but instead of prescribing *the terms*, or the *character* of the confirmation, the statute in either country only directs the *medium* through which alone it *shall be proved*, namely, that it shall be *in writing, signed by the party to be charged*, instead of being by word of mouth merely. Independently of statute, the infant's ratification may be *by parol*, and that (according to the better opinion) even where the original promise is *under seal*, although the contrary opinion is sustained by an authority so eminent as Lord Ellenborough. (*Baylis v. Dineley*, 3 M. & S. 482.) The doctrine stated, however, is supported by the whole weight of the American decisions. An infant's *bond* is considered a valid obligation, unless after age *he elects to avoid it*; and as the confirmation after age is the *exercise of this right of election*, it effectually precludes him from exercising it again in the opposite direction, by his plea of infancy. The confirmation does not impart to the contract what did not exist in it before, but divests it of the quality of *voidableness* which originally belonged to it, simply because the choice, which can be exercised but once, has been made; and it is apparent that this result must ensue under like circumstances, whether the contract be by parol or under seal. (1 Am. L. C. 255-6.)

But whilst, independently of the statute alluded to (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 134, § 2840, (cl. 2),) the confirmation may be by parol, and may be signified either *by words or by conduct*, it must be yet *clear and unequivocal*. It must also be before the commencement of the suit, and must be voluntary, deliberate and intelligent; and if conditional, it must appear that the condition has been fulfilled. It has been said, also, that it must be made to the *other party himself, or his agent*, and not to a stranger. It would seem, however, that a confirmation to a stranger would be *satisfactory proof* of a new promise to the party himself, just as a clause in a will directing all just debts to be paid; or, as is a conveyance after age, *subject to a mortgage* made during infancy, a confirmation of the latter. (1 Pars. Cont. 269-70 and n. (a); 1 Chit. Cont. (11 Am. ed.) 215; 1 Am. L. C. 253-4; *Merch'ts & F. Ins. Co. v. Grant*, 2 Edw. (N. Y.) 554; *Boston Bank v. Chamblin*, 15 Mass. 220; *Mountstephen v. Brookes*, 3 B. & Ald. (5 E. C. L.) 141; *Clarke v. Hougham*, 2 B. & Cr. (9 E. C. L.) 149.)

No particular form of words is required to make a confirmation. It suffices that they import an unequivocal *recognition and confirmation* of the previous engage-

ment; and they need not amount to a *direct promise to pay*. "I have not the money now, but when I return I will settle with you," (Martin v. Mayo, 10 Mass. 137); "I will pay it (the note) as soon as I can make it, but not this year," (Bobo v. Hansell, 2 Bailey (S. C.) 114); "I will endeavor to procure the money, and send it to you" (Whitney v. Dutch, 14 Mass. 457); "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time" (Hartley v. Wharton, 11 Ad. & El. (39 E. C. L.) 934);—all these have been decided to be *sufficient ratifications*. See, also, 1 Pars. Cont. 270, n. (a); Harris v. Wall, 1 Excheq. 122; Best. v. Givens, 3 B. Monroe, (Ky.) 72.

On the other hand, these expressions, "I owe the debt, and you will get your pay, but *I will not give a note*" (Hale v. Gerrish, 8 N. H. 374); "I owe you, but am unable to pay, but will endeavor to get my brother bound with me" (Ford v. Philips, 1 Pick. 202); "I consider your claim worthy of my attention, but not of my first attention, but I will soon give it the attention due it" (Wilcox v. Rowth, 12 Conn. 550); have been held to be *not sufficient ratifications*. (1 Pars. Cont. 270, and n. (a).)

Independently of statute, an infant may manifest a confirmation of his contracts after coming of age, as well by *his conduct* as his *words* (Bac. Abr. Inf'y, (I.) 8; 1 Chit. Cont. (11 Am. ed.) 215-'16, and n. (t);) as by enjoying or claiming the benefit or advantage under a contract or transaction, which he might have wholly rescinded (Barnaby v. Barnaby, 1 Pick. 221, 223.) Thus, in case of a contract of service made during infancy, if the infant after coming of age, enjoy the benefit of the contract on his side, he must perform its stipulations on the other. And hence, where the contract *is entire*, if the infant in any manner confirm it in part, the whole is confirmed. Thus, an infant having sold a house with warranty, and taken the purchaser's note for the price, after coming of age sued on the note, and was held thereby to have confirmed the warranty, which was part of the entire contract of sale. So it is said, if an infant partner, after age, transacts the business of the firm, and receives the profits, he thereby confirms the contract of partnership, and becomes bound for all the previous liabilities of the firm, although not known to him. But a *partial payment* is not a ratification of the residue, nor is a mere omission for a considerable time after coming of age to disaffirm the contract. (1 Am. L. C. 256; 1 Pars. Cont. 270-'71.)

In respect to *continuing contracts*, however, such as contracts of partnership, of lease, etc., an omission for a considerable time after coming of age to disaffirm the contract will subject the infant to answer for all the liabilities accruing by reason of such continuing contract, after the termination of his minority. Thus, if an infant enter into a contract of partnership, and upon coming of age he does not promptly repudiate it, he will be liable, by reason of the partnership, for all the transactions then or afterwards occurring, although personally not cognizant of them. (1 Chit. Cont. (11 Am. ed.) 216; Bac. Abr. Inf'y, (I.) 8; R'way Co. v. McMichael, 5 Excheq. 127; Evelyn v. Chichester, 3 Burr. 1719; Goode v. Harrison, 5 B. & Ald. (7 E. C. L.) 147.)

In regard to the confirmation of infant's *executed contracts*, implied from conduct after coming of age, there is a difference between the case of a *sale* and of a *purchase* made by him, and perhaps, also, between the purchase of *lands* and the purchase of *chattels*. The governing principle in all cases is that to appropriate, after full age, any benefit arising from a contract entered into during infancy, *confirms it*.

Such appropriation is more likely to occur in the case of a *purchase* than of a *sale*, and in the case of a purchase of *land* than of *chattels*, which are very liable to be lost, sold, or consumed during non-age; but the same general doctrine *applies to all*. (1 Am. L. C. 256-'7-'8.)

With respect to the time and manner of avoiding contracts by infants, a distinction is to be observed between *sales of lands*, on the one side, and contracts of a *personal kind*, or relating to *personal property*, on the other. In cases of *sales of lands*, the infant may enter *under age*, and hold or take the profits, but he cannot *conclusively* and finally avoid the conveyance until he is of age. The avoidance may then be by entry on the premises, by an action of ejectment to recover them, or by any act unequivocally manifesting an intent to avoid. Even a *re-sale* after age to another person will avoid a previous conveyance where (as in Virginia, V. C. 1873, ch. 112, § 5; V. C. 1887, ch. 107, § 2418; Carrington v. Goddin, 13 Grat. 587) one out of possession is allowed by law to convey land. The first vendee's title being then disaffirmed and annulled, both in law and equity, the second purchaser, who bought after the infant attained his age, may recover. This supposes, of course, that the two conveyances are incompatible the one with the other; for if they can stand together, the last affords no evidence, at least intrinsically, that the infant meant to repudiate the first. (1 Am. L. C. 259; Mustard v.

Wohlford, 15 Grat. 329, 335; Frost v. Wolverton, 1 Stra. 94; Tucker v. Moreland, 10 Pet. 58.) It will be remembered, also, that it is a part of the infant's privilege to avoid his contracts, not only against the party originally contracting with him, but also against persons claiming under such party, even against a *bona fide* purchaser for value from the grantee. (1 Am. L. C. 259; Mustard v. Wohlford, 15 Grat. 329.)

Contracts of a *personal kind*, or relating to *personal property*, on the other hand, may be *immediately avoided* without waiting for the minor to attain his age, and that finally and *conclusively*; because otherwise irreparable injury might ensue. And the avoidance may be by any act clearly demonstrating a renunciation of the contract, as in case of a contract to serve, leaving the service and going elsewhere. (1 Am. L. C. 259.)

As to the consequences of an infant's avoidance of his contracts, we must distinguish between such contracts as are *executory* on his part, and those which are *executed*.

Where the contract is *executory* on the infant's part, he may always avoid it, supposing it to be of a voidable nature; but whatever consideration he may have received, if it be still in his *possession or control*, he must return it. He may protect himself by his infancy against advantages which otherwise might be taken of his incapacity and want of experience, but it is not to be employed to procure a benefit for himself at the expense of other persons. He cannot repudiate the contract (which is really to *annul and revoke it*) and at the same time retain what the contract alone *gives him any right to*. If, indeed, the *consideration*, whether it be money or property, has been spent, consumed, or has otherwise ceased to be in his possession or under his control before he arrives at age, he is not to be prevented from avoiding his contract because he cannot or does not restore the consideration. To exact such a condition would in very many, if not in most cases, defeat the design of the law in making such promises voidable. It would suppose the existence, on the part of the infant, of those very qualities of providence and care, the absence of which obliges the law to protect him by making the contract voidable. His refusal after age to restore the consideration, if he *still has it*, is an *affirmance* of the contract; and his plea of infancy is a *rescission of it*, and therefore *revests* in the other party a *title to the consideration*, supposing the infant to be in possession of it. But if it be not then in possession, by reason of the same having been spent, consumed, or aliened by the

infant during his minority, the omission to restore it affords no cause of action against him, because he is prevented from doing so by what took place during infancy, when the contract was in full force, and when it was lawful for him to do with the subject what he would. (1 Am. L. C. 259 '60; Mustard v. Wohlford, 15 Grat. 329, 340 & seq.; Bedinger v. Wharton, 27 Grat. 857.)

Where the contract is *executed* in whole or in part, on the side of the infant, he may, it seems, *rescind the agreement* and recover the money or property advanced, or a proper compensation for the work done by way of consideration, but in general not without restoring to the other party the *equivalent received*; for it would be unjust to permit him to recover back what he has paid or delivered, and at the same time to retain what he has received by reason of the contract. (Taft v. Pike, 14 Vt. 405, (39 Am. Dec. 228); Walker v. Ferrin, 4 Id. 523; Weed v. Beebe, 21 Id. 495; Kitchen v. Lee, 11 Paige, (N. Y.) 107, (42 Am. Dec. 101); Price v. Furman, 27 Vt. 268, (65 Am. Dec. 196).)

This rule, however, is subject to this important qualification, namely: That where the property has been lost, sold, or destroyed during the infant's minority, the obligation to return it, as the price of being permitted to vacate the contract ceases to exist; for otherwise the improvidence incident to his age would be the means of depriving him of the protection which it is the object of the law to secure to him. (Tucker v. Moreland, 10 Pet. 59 (1 Am. Lead. Cas.) (1st ed.), 260; Fitts v. Hall, 9 N. H. 441; Robbins v. Eaton, 10 Id. 562; Boody v. McKimney, 23 Maine 517, 525, 526; Price v. Furman, 27 Vt. 268, (65 Am. Dec. 196 '7); Manning v. Johnson, 62 Am. Dec. 737, *note*.)

Thus, if an infant has *paid money* for a horse, or given in exchange another horse, and upon coming of age, chooses to avoid the transaction, he may do so, and receive back the price etc., but *only on condition* of redelivering the horse, supposing it still to be in his possession or power; but supposing the horse is no longer in his power, he may, notwithstanding, oblige the other party to pay him back the money. This doctrine is well illustrated in the cases above cited, but can hardly be reconciled with the two noted cases of Holmes v. Blogg, 8 Taunt. (4 E. C. L.) 509, 37, and Corpe v. Overton, 10 Bingh. (25 E. C. L.) 252. It is further illustrated by the case where the infant has engaged to labor for a certain period, and after doing some work abandons the job; when, according to the weight of authority, he is allowed to recover in general, upon a *quantum meruit*

for the work he has done, instead of upon the contract, and that without abatement for any injury he may have occasioned by the failure to complete his contract. (3 Rob. Pr. (2d ed.) 223-'4; 1 Pars. Cont. 263, 268; 1 Am. L. C. 260-'61.)

Whilst this is the rule in respect to *contracts executed*, in general, and especially contracts of *purchase* by the infant, a different measure of justice prevails where the minor seeks to rescind a *contract of sale*. It is obvious that to exact in this case the return of the *purchase-money* by the infant, would be, in fact, to deny him, in most cases, the benefit of his infancy. (3 Rob. Pr. (2d ed.) 227-'8; Mustard v. Wohlford, 15 Grat. 342; Bedinger v. Wharton, 27 Grat. 871-'2.)

The avoidance of the contract on the infant's part, whether it be executed or executory, *must be entire*, or it does not operate at all. He cannot pretend to rescind so much as he may deem adverse to him, whilst he claims the benefit of what is in his favor. Thus, if he buy land, and execute bonds for the purchase-money, upon coming of age he cannot plead infancy to the bonds, whereby he disaffirms the *whole contract*, and at the same time claim the land. (1 Am. L. C. 261-'2.)

Allusion has repeatedly been made to a statute with us, taken from 9 Geo. IV., c. 14, § 5, which directs that the confirmation of infant's contracts shall be *in writing*. The enactment (V. C. 1873, ch. 140, § 1; V. C. 1887, ch. 133, § 2840), is that "no action shall be brought to charge any person upon a promise after full age to *pay a debt* contracted during infancy, or upon ratification after full age of a *promise or simple contract* made during infancy, unless the promise or ratification, or some memorandum or note thereof, *be in writing*, and *signed by the party* to be charged thereby, or his agent." The non-adaptation of this statute to the mischief in view has been already stated. Its effect, perhaps inadvertently, seems to be limited to contracts to *pay money*, whether under seal or not, and to contracts to *do collateral things* (*i. e.*, something else than to pay money), only when the engagement is a *simple contract not under seal* (the word *promise* properly importing an undertaking *by parol or not under seal*.) (2 Steph. Com. 108; Burr. L. Dict. Promise, 7.) When the undertaking is to do a *collateral thing under seal*, or when the transaction is an *executed contract*, the statute appears inapplicable, and if so, the confirmation of such transactions may be as at common law.

It is too remarkable to be passed by without notice, that the common law holds all an infant's contracts *by*

matter of record (such as recognizances, judgments, &c.) to be for the most part voidable *only* during the *party's minority*, because non-age, in order to avoid the solemnities of such a transaction, can be tried *only by inspection by the court*, and not by a jury. (1 Th. Co. Lit. 178 '9; Bac. Abr. Inf'y, (8); 2 Kent's Com. 237; Randall v. Wade, Yelv. 88; Harrison v. Worley, 2 Dyer. 232.)

3. The Acts for which Infants are Liable, notwithstanding their Infancy.

Infants are liable, notwithstanding their non-age, for mere *torts*; that is, injuries other than such as arise *out of the breach of contracts*, just as an adult is. "If an infant commit an assault or utter a slander," said Lord Kenyon, in *Jennings v. Rundall*, 8 T. R. 337, "God forbid that he should not be answerable for it in a court of justice." Nor does it acquit him of liability that he acted by command of another person, or through an agent. For all manner of torts—trespass, assault, slander, fraud, wrongful conversion where there is no contract, &c.—he is incontestably responsible in an action. (*Humphrey v. Douglass* (10 Vermt. 71), 33 Am. Dec. 177, 179, *note*.) Thus, an infant who obtains goods fraudulently, without intending to pay for them, is liable *for the fraud*; that is, for the value of the goods; and in general, where money or goods have, *without contract*, gone into an infant's hands wrongfully, as by embezzlement, or are retained by him wrongfully, they may be recovered. (1 Pars. Cont. 264; 1 Am. L. C. 262; Bac. Abr. Inf'y, (H.); *Bristow v. Eastman*, 1 Esp. 173; *Mills v. Graham*, 1 Bos. & Pul. N. R. 144; *Vasse v. Smith*, 6 Cr. 226.)

There are, however, transactions so ambiguous that they may very well be regarded either as torts or as breaches of contract; but it may well be conceived that it is not at the option of the other party to make an infant responsible or not for a transaction, by treating it as a tort or as a contract. The liability of an infant wrong-doer is in such case determined, not by the caprice of the plaintiff, but by the *prevailing character* of the injury, or, as it has been sometimes expressed, on whether a liability can be made out *without taking any notice of the contract*. If that *prevailing or predominant character* be *tort*, the infant is answerable; whilst if the predominant character be *contract*, the infancy is a defence. And it would seem (*Bristow v. Eastman*, 1 Esp. 173) that whether the plea of infancy is to be admitted or not depends not, in either case, *upon the nature of the action*; so that whilst, on the one side,

infancy is allowed as a bar to an action of *trover* or of *detinue* (although they are actions of *tort*), when the character of *contract* predominates in the business out of which the action arises; so, on the other side, infancy will be no answer to an action of *assumpsit* or of *debt*, (although they are actions of *contract*), where the *predominant element is tort*.

Thus, if the *bailee* of a chattel (*i. e.*, a person to whom the chattel is delivered for some specific purpose, as to use, to carry, to repair, etc.), treat it so *negligently* that injury results, the bailor may in general, at his option, regard the wrong either as a *breach of the contract* of bailment, or as a *tort*. And so, upon a breach of *warranty of the quality* or title of a chattel, when the defect is known to the warrantor, the sufferer may, at his election, treat it as a *violation of contract* or as a *deceit*, and, therefore, a *tort*. But it is manifest that in both these cases the *predominant character* of the transaction is *contract*, and *not tort*; and, therefore, if the wrong-doer be an infant, he is not to be ousted of his defence of infancy by the plaintiff electing to treat the matter as a tort. On the other hand, if the bailee *wilfully* injure the thing bailed, or if he pervert it from its destined use (as where he puts a horse *in the plough* which he hired to ride, or having hired a horse to go to a place agreed, he goes to another place in a different direction), the bailment may be considered as thereby *terminated*, which makes the bailee thenceforth a *trespasser*; or in his election, waiving *the tort*, the bailor may regard the bailee as still in possession, and liable under the *contract* of bailment. In this instance the *predominant character* of the transaction is *tort*, and *not contract*; and the wrong-doer's *infancy is no defence*. (1 Am. L. C. 262-'3; 1 Pars. Cont. 264; 1 Chit. Pl. 87; 1 Chit. Cont. (11 Am. ed.) 209, n. (f); Jennings v. Rundall, 8 T. R. 337; Johnson v. Pie, 1 Lev. 169; Homer v. Thwing, 3 Pick. 492; Vasse v. Smith, 6 Cr. 226; Green v. Greenbank, 2 Marshall, (4 E. C. L.) 485.)

CHAPTER XVIII.

OF CORPORATIONS.

2^a. The Rights which Relate to Corporations, or Artificial Persons.

It will be remembered that at the beginning of the discussion of the *rights which relate to the person*, a distinction was adverted to (*Ante*, p. 65), between the rights which concern

the person in respect to *natural persons*, and those in respect to *artificial persons*,—bodies politic, or *corporations*. To this latter topic we are now come.

From the exposition thus far made of the rights and duties which relate to the person in respect to *natural persons*, it is apparent that the contrast between them and *artificial persons* cannot, in general, relate to any rights which concern merely *the person*, whether absolute or relative, but to those rights only, or at least *chiefly*, which are connected with *property*. The forms which would be requisite in order to invest a *series of individuals*, one after another, in indefinite succession, with the same identical rights with regard to property, would be very inconvenient, if not impracticable. And, therefore, as well as for other reasons, which will be mentioned in the sequel, it has been usual, and is found expedient, when it is desired to have any particular class of property or of rights kept on foot, and continued for a length of time, to constitute such artificial persons or bodies politic, who may maintain a perpetual succession, and enjoy a kind of legal immortality. (1 Bl. Com. 467; 2 Kent's Com. 267, &c.; Bac. Abr. Corporations; Angell & Ames on Corporations.*)

In unfolding the subject, it will be expedient to treat it under the following heads, viz:

- 1, The Origin and Nature of Corporations;
- 2, The Several Kinds of Corporations;
- 3, The Creation and Organization of Corporations;
- 4, The Modes of Action, and the Powers of Corporations;
- 5, The Relation of Members to the Corporation;
- 6, The Visitation of Corporations;
- 7, The Judicial Proceedings Employed to Restrain and Direct Corporations in the Exercise of their Franchises; and
- 8, The Dissolution of Corporations;

W. C.

1^b. The Origin and Nature of Corporations.

A corporation is a *mere creature of the law*, invisible, intangible, and incorporeal. It is defined by Chancellor Kent to be “A *franchise* possessed by *one or more individuals*, who subsist as a body politic, under a special denomination, and are vested by the policy of the law with the capacity of *perpetual succession*, and of acting in several respects (however numerous the association) *as a single individual*.” (2 Kent's Com. 267; 1 Browne's Civ. & Adm. Law. 141; Bank of U. S. v. Deveaux, 5 Cr. 61.) Perhaps a more accurate definition would be—A *body* composed of one or more indi-

* NOTE. The excellent and exhaustive treatise on Corporations of Messrs. Angell and Ames, to which frequent reference will be made in the ensuing pages, cannot be too strongly recommended to the student. There are few questions connected with the subject to which that work does not afford a solution; and perhaps not one to which it does not supply at least a key.

viduals, and possessed of a franchise, by virtue of which it subsists as a body politic, under a special designation, and by the policy of the law is vested with the capacity of perpetual succession, and of acting in several particulars, however numerous the association, *as a single individual*.

The essential faculties of a corporation which distinguish it from a mere voluntary association are, (1), A distinctive artificial name, by which it can make contracts and acquire and dispose of property; (2), Authority to sue or be sued, in that name, or in the name of one or more of its officers, as representing the association; (3), Being an *entity* distinct from its members, so that they may sue it, and be sued by it; (4), Provision for its perpetuity, by transfer of its *choses*, or effects, so as to secure succession of membership. (*Liv. Ins. Co. v. Massachusetts*, 10 Wal. 574.)

The exemption of the corporators from individual responsibility for the debts and engagements of the company, although at common law it was a usual incident to the existence of a corporation, is not, at least in the United States, an indispensable incident; so that if a company possess the attributes above named, it is a corporation, notwithstanding provision be made for the personal liability of the members severally for debts of the concern; and where the company is created in a foreign country, whose law expressly declares that it shall *not be a corporation*, it is still such with us, despite such declaration, supposing it to possess the attributes above indicated. (*Liv. Ins. Co. v. Massachusetts*, 10 Wal. 575, 576.)

Chancellor Kent describes the *object* of the institution of a corporation to be "to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals, however many, composing a corporation, and their successors, are considered in law but as *one moral person*, capable, under an artificial form, of *taking and conveying property, contracting debts and duties*, and of enjoying a variety of civil and political rights. One of the peculiar properties of a corporation is the power of *perpetual succession*; for, in judgment of law, it is *capable of indefinite duration*. The rights and privileges of a corporation do not determine or vary upon the death or change of any of the individual members. They continue as long as the corporation endures." (2 Kent's Com. (12th ed.) 267-'8.)

It is sometimes said that a corporation is *immortal*; but its immortality means only a *capacity for perpetual succession* as long as it exists. So far from being, in fact, immortal, most private corporations, created by or in pursuance of

statutes, are limited in duration to a few years, although there are still many without limitation, and therefore capable of continuing indefinitely, as long as a succession of individual members can be kept up. (2 Kent's Com. (12th ed.) 267-'8.)

It was chiefly for the purpose of clothing bodies of men in succession with the qualities and capacities of one single, artificial being, that corporations were originally invented, and for the same convenient purpose they have been brought largely into use—more largely, and for more varied and important purposes of manufactures, trade and commerce, within the present century than ever before. By means of corporations, many individuals may act in perpetual succession as one; may transmit their estates with facility to their successors, without the multiplicity of conveyances, which would otherwise be requisite; and may transact business without incurring, at common law, any *personal* responsibility, or exposing to loss any other property than so much as they may severally think fit to put into the common stock of the corporation. In Virginia there is also by statute a further convenience, which, however, is believed to subsist independently of statute, namely, that the *shares*, although the property of the corporation may consist of real estate, are declared (V. C. 1873, ch. 57, §§ 21, 63; V. C. 1887, ch. 47, §§ 1125, 1149) to be *personally*, and therefore capable of being conveyed and transmitted with more facility than if they were real. (1 Bl. Com. 467-'8; 2 Kent's Com. 268.) But so far as relates to the title of the *corporation itself* to *lands*, it must be conveyed as in the case of natural persons.

A share in an incorporated company, as above remarked, is believed to be, at common law, independently of statute, in all cases personal property, whatever may be the subject owned by the corporate body itself. This conclusion results from the definition of a *share*, which is "a *right to partake*, according to the amount of the party's subscription, *of the surplus profits* obtained from the use of the capital stock of the company in the manner contemplated, and a right to a distribution *pro rata* of the effects remaining, after payment of debts, at the expiration of the charter." (Ang. & A. Corp. (10th ed.) §§ 557, 558; Bradley v. Holdsworth, 3 M. & W. 334; Bank of Waltham v. Waltham, 10 Met. (Mass.) 595; Tippetts v. Walker, 4 Mass. 595; Barksdale v. Finney, 14 Grat. 357.)

The common law derives its doctrine, and its distribution, of corporations from the Roman law, with which, however, they did not originate, as Blackstone inadvertently states (1 Bl. Com. 468). They are indeed recognized by the law of the *XII. Tables* (Table VII.), but that law was confessedly borrowed from the laws of Solon at Athens. Solon seems to

have permitted such associations, whether for purposes of mere affection, of business, or of devotion, with the utmost freedom, subject only to the condition that nothing should be done *contrary to the laws of the land*. (Cooper's Justin. Insts. 594; Dig. Lib. 47, Tit. 22, 4; 1 Kent's Com. 525, n.)

The Roman law styled corporations *universitates*, or *universities*, as forming one whole out of many individuals, and *collegia*, from many being gathered together into one; names which, in modern times, have been more usually confined to those corporations instituted for the education of youth and the advancement of learning. In the Roman law corporations are always *aggregate*—that is, composed of several persons,—never *sole*, consisting of *one only*. Its maxim is "*Tres faciunt collegium*," although if the number be, by subsequent contingency, reduced to one only, it may still subsist as a corporation, *si universitas ad unum redit, et stat nomen universitatis*. (1 Bl. Com. 468-'9; Browne's Civ. & Adm. Law, 141 & seq.; Dig. Lib. L., 16, 85; Id. Lib. III., 4, 7.)

The *powers and the incapacities* of corporations in the Roman law were very similar to those recognized by our own common law, which will be presently exhibited. (1 Bro. Civ. & Adm. L. 145 to 147.)

The will of a corporation, by the Roman law, was determined, as with us, by the voice of the *major part* of the members, notwithstanding Blackstone's inaccurate statement that *two thirds* were required. (1 Bro. Civ. & Adm. L. 147, and n. (16); Dig. Lib. L., 17, 160; Id. Lib. L., 9, 2 & 3.)

The objects for which corporations were created at Rome were very various, and in many instances, at least in the earlier periods, *political*. Numa is said to have resorted to them as a safeguard against the rival factions of the Sabines and Romans, hoping, by subdividing the hostile races into smaller societies of every particular trade and profession, at least to abate the evil. (1 Bl. Com. 468-'9.)

Corporations framed for the advancement of learning, in their precise present state and form, seem to be the fruit of modern invention, although the Roman law, at least in its later periods, recognized institutions approximating to our modern colleges. Thus, in the time of the emperors, the professors in different sciences began to receive regular stipends from the public treasury, and to be subject to regulations ordained by the State. And it is especially interesting to lawyers to know that the most flourishing and celebrated of these seminaries were for the purpose of *teaching the laws*. They were promoted chiefly by the emperors Constantine, Theodosius, and Justinian, the latter of whom restricted the study of the law to the three schools of Rome, Constantinople, and Berytus (now Beyroot), in Syria. The

students in these institutions were subjected to a *five years' course*, and derived from academic testimonials of proficiency no small privileges and advantages, as the graduates of the English universities now do. (1 Bro. Civ. & Adm. L. 162-'3.)

The Grecian youth, who long before used to attend the schools of philosophy and rhetoric at Athens and elsewhere, listened to teachers who were not authorized by the state, nor formed into corporate bodies upon a public foundation, endowed with legal capacities, subject to regulations of their own, and possessed of funds of maintenance independent of the honorary fees paid by students. The state sometimes so far lent its sanction to the philosopher's teaching as to give him an assigned and fixed seat of instruction, as the Academy to Plato and the Lyceum to Aristotle; but their disciples acquired by their attendance no privileges similar to those of graduation in the English universities, nor was that course of study made by law a necessary preparation to any profession or pursuit. (1 Bro. Civ. & Adm. L. 151 & n. (10).)

It was not until after the revival of letters in Europe,—indeed, not until the thirteenth century,—that colleges and universities assumed that form which they have at present, having public authority to teach and to confer academical degrees, which, *in Europe*, carry with them certain established privileges accorded by law. (1 Bro. Civ. & Adm. L. 151, &c. and n. (10).)

2^b. The Several Kinds of Corporations.

To understand the qualities of corporations with discrimination, they must be marshalled into classes according to several grounds of distinction,—that is, according to the *number of persons* which compose them; according as the *government is or is not concerned* directly in them; and according to the *object and design* of their organization;

W. C.

1^c. The Several Kinds of Corporations, According to the *Number of Persons* which Compose Them.

Corporations, according to the number of persons which compose them, are either, (1), Corporations aggregate; or (2), Corporations sole;

W. C.

1^d. Corporations Aggregate.

A corporation aggregate consists of *many persons* united into one society, who are kept together by a perpetual succession of members, so as to have the capacity to continue for ever. Of this kind are the mayor and commonalty of a city, the president and masters of a college, the shareholders of a bank, of a railroad, of a turnpike, etc. (1 Bl. Com. 469.) A corporation aggregate is usually composed of a number of natural persons, in their natural capacity;

but it may consist also of bodies politic and corporate, either wholly or in conjunction with natural persons. Thus, the government of a country, or county, or city, is often a member of a private corporation, as of a banking, railroad or canal company. Such combinations, however, are not favored, and in Virginia it is provided by statute (V. C. 1873, ch. 56, §§ 2, 3; V. C. 1887, ch. 46, §§ 1070, 1071); that "one company shall not subscribe to the stock of another, unless it be specially allowed by law;" which provision, however, is not to prevent a company from receiving stocks or other property in satisfaction of any judgment, etc., or as collateral security for, or in payment of, a debt, or from purchasing them at a sale made for its benefit; and if it thus acquires shares of its own stock, it may either extinguish them, or transfer them to a purchaser; but whilst it holds them no vote is to be given thereon. (V. C. 1873, ch. 56, § 3; V. C. 1887, ch. 46, § 1071.) The State, however, may acquire the works of an internal improvement company by forfeiture (V. C. 1873, ch. 61, § 55; V. C. 1887, ch. 51, § 1239) and counties, cities, and towns may subscribe for the stock of such companies. (Id. §§ 62 & seq.; V. C. 1887, ch. 51, §§ 1243 & seq.)

2^d. Corporations Sole.

A corporation *sole* consists of *one person only*, e. g., the king, a bishop, or a parson. In Virginia no instance of a corporation *sole* seems now *practically* to exist, but it might at any time be created *by statute*.

Before the Revolution of 1776, ministers of the Episcopal church (then, by law, the *established church* of the colony), when they were *inducted* into their parishes, had a *freehold estate* in the *glebe* attached to the church, and seem to have been *corporations sole*. And some suppose that after the adoption of the Federal Constitution in 1789, the rights of the church to these *glebes*, etc., through the parsons, as sole corporations endued with the capacity of perpetual succession, could no more be impaired than any other *vested right*. (Brunswick v. Dunning, 7 Mass. 447; Weston v. Hunt, 2 Mass. 500; Terrett v. Taylor, 9 Cr. 43.) But the well settled doctrine in the *Virginia Courts*, is that the Revolution swept away the church establishment, and all its appendages; that the acts of 1776, 1784, 1786, 1788, confirming to the Episcopal church, as the successor of the legal establishment, the possession of its glebes and other property, were *properly and constitutionally* repealed by the act of 1798, as inconsistent with the constitution and the principles of religious freedom; and that the act of 1801, appropriating all the property of the Episcopal church, and the glebes, as fast as they became *vacant*, to the use of the poor, etc., was *not unconstitutional*.

tional. (Turpin, &c. v. Lockett, &c. 6 Call, 113; Selden v. Overseers, &c., 11 Leigh, 127; 1 Tuck. Bl. App'x, n. (M.), p. 104, &c.; 1 Tuck. Com. App'x, p. 445, &c.)^{*}

2^c. The Several Kinds of Corporations, According as the *Government is or is not Concerned Therein.*

Corporations, according as the government is or is not concerned therein, are, (1), Public; and (2), Private;

W. C.

1^d. Public Corporations.

A public corporation is one which has for its object the *municipal government* of a portion of the people (*a g.*, a city or a county); or which is founded for other *public*, although they be not *political* purposes, and which *belongs wholly to the government*,—such as the University of Virginia, the Board of Education, etc. (Ang. & A. Corp. (10th ed.) §§ 14 & seq., 23, 24; Bank of U. S. v. Planters Bank, 9 Wheat. 907. Bank of U. S. v. McKenzie, 2 Brock. 393; Sayre v. N. W. Turnpike Co. 10 Leigh, 454; Trustees of Univ. of Ala. v. Winston, 5 Stew. & Port. (Ala.) 17.)

The legislature, as a trustee for the public, may modify or abolish public corporations at pleasure, there being in them no element of contract with any one; but private corporation charters are regarded as *contracts*, the obligation of which the States are prohibited by the United States Constitution (Art. I., § X., 1) *to impair*, (2 Kent's Com. (12th ed.) 305; St. Mary's Church, 7 S. & R. (Pa.) 559; City of Louisville v. Pres. of University, 15 B. Monr. (Ky.) 642; Terrett v. Taylor, 9 Cr. 52; Dartmouth Col. v. Woodward, 4 Wheat. 636; Richm., Fred. & Pot. R. R. Co. v. Louisa R. R. Co. 13 How. 71; Jas. Riv. & K. Co. v. Thompson & al. 3 Grat. 270; City of Richmond v. Rich'd & Danv. R. R. Co. 21 Grat. 604, 617); a principle which, however, does not forbid a State, in the exercise of the right of *eminent domain*, from altering or abolishing a charter in *any case*, when the public advantage requires it; but always upon condition of making a *just compensation*, corporate franchises being no more exempt from the exercise of the right of eminent domain than other property. (James Riv. & K. Co. v. Thompson & al. 3 Grat. 270.)

Municipal corporate bodies are either municipal corporations *proper*, such as cities and towns, or *quasi* corporations, such as counties, townships, etc. Both classes are further distinguished from *private* corporations in having, for the most part, *no corporate funds* from which a judgment against them can be satisfied, and in the consequent *personal* liability, it was once said, of the individual

* NOTE.—An interesting dissertation, by Mr. Jefferson, upon the relation of the church in Virginia to the Colonial government, may be seen in the case of Godwin v. Luman, Jeff. Rep. 97 & seq.

corporators for the corporate debts; for cities, towns, counties, etc., being instituted only for political and civil purposes, each member thereof (if by *statute*, a private action lies against the corporation at all), is liable, if this opinion prevails, in his person and private estate to the execution. (Ang. & A. Corp. (10th ed.) § 629; 2 Kent's Com. 274; Russell v. Men of Devon, 2 T. R. 667; Atto. Gen. v. Exeter, 2 Russ. (3 Eng. Ch.) 53.) But this doctrine seems not maintainable. In the absence of any statutory provision upon the subject, it is believed that, upon judgment being obtained against a municipal corporation, an execution to satisfy the same can be levied only on such property as the corporation owns for *profit*, and charged with no public trust or uses, and not upon property owned or used by it for public purposes, such as public buildings, hospitals and cemeteries, fire-engines and apparatus, water works, and the like. When the corporation has no property liable to execution, the proper proceeding is by writ of *mandamus* to compel the corporate authorities to levy a tax to pay the demand. (2 Dill. Mun. Corp. §§ 446, 686, & n. 1; Chicago v. Hasley, 25 Ill. 595; Horner v. Coffey, 25 Miss. 434; Knox Co. Comm'r v. Aspinwall, 24 How. 384-'5; Supervisors v. U. States, 4 Wal. 446-'7; City of Galena v. Amy, 5 Wal. 708; Walkley v. City of Muscatine, 6 Wal. 483; Benbow v. Iowa City, 7 Wal. 314; Meriwether v. Garrett, 12 Otto (102 U. S.), 472, 501, 511 & seq.)

A question arises, however, inasmuch as municipal corporations (whether, cities, towns, or counties), are liable to have their charters modified or to be *wholly dissolved*, in the discretion of the legislature, how such modification or dissolution affects the *existing* debts and liabilities of the corporation? The doctrine seems to be this: In case of a mere *modification* of the charter, as by giving a new form to the corporation, or re-organizing it under a new charter, embracing substantially the same territory, and the same corporators, it will be presumed, in the absence of any clear provision to the contrary, that the legislature designed a continued existence of the same body politic, although it be with different powers, and under the administration of different officers; and consequently that the liabilities, as well as the rights of property of the old corporation, shall accompany it in its re-organization. (Broughton v. Pensacola, 3 Otto (93 U. S.), 269-'70; Wheat. Internat. Law (2d Lawrence ed.), 52 & seq., & notes.) But supposing the legislative intent to be clearly manifested to *dissolve* the corporation, a *mandamus* to compel the levy of taxes would be clearly inapplicable, there being no authority in existence, less than the legislature, capable of levying them, unless such authority be

created by statute, general or special. For it is a principle which is believed to admit of no exception, that the power of taxation resides *exclusively* in the legislative department of the government, to be exercised either directly by itself, or by such officials as it may designate. The sole recourse, therefore, *in the courts*, against the defunct corporation, is to file a bill in equity to subject what may be called its *private* property, being such as it used *for profit*, such as water-works or gas-works, in contradistinction to what it held simply as trustee for the public, such as public buildings, parks, cemeteries, etc.; and to subject also such taxes as before the dissolution of the corporation had been lawfully levied in order to *pay the debts*, and had been *actually collected*. Equity regards the *available* property of a corporation which has ceased to exist as a *trust fund*, to be administered by the court of equity for the benefit of such creditors as have a right to charge it; contrary to the old doctrine upon which the courts of Virginia acted until it was altered by statute, that upon the dissolution of a corporate body without a previous assignment of its effects, the lands belonging to it revert to the grantor; the personalty devolves, as *bona vacantia*, upon the commonwealth; and the debts due to and by it are respectively lost. (Rees v. City of Watertown, 19 Wal. 116; Heine v. Levee Comm'rs, Id. 666, 667; Broughton v. Pensacola, 3 Otto (93 U. S.), 268; Meriwether v. Garrett, 12 Otto (102 U. S.), 512 & seq.; *Post*, p. 566; V. C. 1873, ch. 56, § 31; V. C. 1887, ch. 46, § 1103.)

Supposing that the dissolved corporation has no resources which the creditors can reach as above described, nothing remains for them but to appeal to the legislature, upon principles of natural justice, to create within the territorial limits of the corporation a taxing power, armed with authority to levy taxes to pay the debts. (Meriwether v. Garrett, 12 Otto (102 U. S.), 520.)

2^d. Private Corporations.

A private corporation is any one *not public*; and in order that it may be *public*, it must not only exist for *governmental* or for *public* purposes alone, but the *whole property therein* (if there be any property) must belong to the government in its *political capacity*. (2 Kent's Com. 305-6; Terrett v. Taylor, 9 Cr. 43, 52; Dartmouth Col. v. Woodward, 4 Wheat. 636; Bracken v. W. & Mary Col. 1 Call. 164.

Thus, banking, insurance, railroad, canal, bridge companies, etc., are *private corporations*, and may be sued and proceeded against accordingly, and that notwithstanding the State may be a principal, may, perhaps the sole shareholder therein. (Ang. & A. Corp. (10th ed.) §§ 14, 30 & seq.; Bank of United States v. Planters Bank, 9 Wheat. 907; Bank of Ken-

tucky v. Wister, 2 Pet. 318; Turnpike Co. v. Wallace, 8 Watts (Pa.) 316; Seymore v. Turnpike Co. 10 Ohio, 476; Moore v. Trustees, 7 Ind. 462; State Bank of South Carolina v. Gibbs, 3 McCord (S. C.), 377; State Bank of North Carolina v. Clark, 1 Hawks. (N. C.) 36; Bank of Alabama v. Gibson, 6 Ala. 814; Mahoney v. Bank of Arkansas, 4 Ark. 620.) For it is said by C. J. Marshall to be a sound principle of law, that when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private person. (Bank of United States v. Planters Bank 9 Wheat. 907; Dunningtons v. N. W. Turnpike, 6 Grat. 170-'71.) Hence, though the United States was a shareholder in the former Bank of the United States, and was therefore a party to all suits to which the bank was a party, yet the doctrine of *nullum tempus occurrit regi* did not apply to exempt the bank from the operation of the statute of limitations. (Bank of U. S. v. McKenzie, 2 Brock. C. C. 401-'2.) And in some instances, what is acknowledged to be a public municipal corporation may stand relatively to the State as a *private corporation*; e. g., where a city exercises a *franchise of gas or water works*, etc. (Moodalay v. E. Ind. Co. 1 Bro. C. C. 469; Nabob of Carnatic v. E. Ind. Co. 2 Ves. Jr. 59; S. C. 4 Bro. C. C. 198; Scott v. City of Manchester, 2 Hurlst. & N. 204; 1 Am. L. C. 622; Bailey v. Mayor of N. York, 3 Hill, 531.)

The student should observe that there are several distinctions between public and private corporations, which are to be specially noted, namely:

(1), That of *public* corporations, as already stated, the legislature, as the trustee and guardian of the public interest, has the exclusive and unrestrained *control*; and as it may create, so it may modify or destroy them, as public exigency requires or recommends; but *private* corporations, whose charters are *contracts*, are by the constitution of the United States, incapable of being abolished or altered by any *State legislature* (because that would be to *impair the obligation of contracts*), unless in pursuance of a power reserved in the charter itself, or by some general statute previous thereto, or unless by virtue of the eminent domain. (Ang. & A. Corp. (10th ed.) § 31; *Ante*, p. 535.)

(2), That a *private* corporation generally has, and always *may* have, a corporate fund from which a judgment can be satisfied; with an occasional responsibility (by statute), of the members for the corporate debts beyond the amount of their interest in the body; whilst *public* corporations, which are *municipal*, have seldom or never any *corporate funds* out of which judgments may be discharged; but according to the better opinion, judgments

against them can in general be enforced only by means of a writ of *mandamus*, to compel the corporate authorities to levy a tax adequate to the purpose; nor are the individual corporators, as it would appear, in any case liable, in person or private estate, to execution on judgments against the body. As to public corporations, *not municipal*, they are generally possessed of corporate funds, against which alone an execution can be directed, to obtain satisfaction for demands due from the body. (Ang. & A. Corp. (10th ed.) § 35; 2 Dill. Mun. Corp. §§ 446, 686, and n. 1; *Ante*, pp. 535-'37.)

(3), That a *private* corporation is liable for any mis-feasance or non-feasance on the part of its officers or agents; whilst a *public municipal corporation*, being established as part of the government, is no more liable than the government itself for any mis-feasance or non-feasance of the persons employed by it. But a public corporation, *not municipal*, or not acting in a municipal capacity, is supposed to be as liable for such defaults as a private corporation. (Ang. & A. Corp. (10th ed.) § 35; 2 Dill. Mun. Corp. §§ 785 & seq., 761 & seq., 789; *Post*. p. 578.)

3^c. The Several Kinds of Corporations, according to the Object and Design thereof.

Corporations, according to the *object and design* thereof, are, (1), Ecclesiastical; and (2), Lay;

W. C.

1^d. Ecclesiastical Corporations.

Ecclesiastical corporations are such as are created for the advancement of religion. They generally consist of *spiritual* (*i. e.*, clerical) persons, and according to Blackstone, of *none others*; *e. g.*, bishop and parson, which are instances of *sole corporations*, and dean and chapter, which are *aggregate*. (1 Bl. Com. 470; Ang. & A. Corp. (10th ed.) §§ 37, 38.)

Ecclesiastical corporations are not wholly unknown in the United States (*e. g.*, in New York, Ohio, and other States), but they do not in this country consist wholly of clerical persons, and cannot be of very familiar occurrence where there is no church by law established. In Virginia, unless theological seminaries may be so styled, they do not exist at all since 1787, and the incorporation of any church or religious denomination is expressly prohibited by the State constitution. (12 Hen. Stats. 266; Va. Const. 1869, Art. V., § 17; *Ante*, p. 534.) But churches, ceme-teries, and parsonages, *by deed*, but *not by will*, and needful church furniture, it would seem in either way, may be *vested in trustees* for the several objects contemplated by them, but not to exceed, of land, *two acres* in an incorporated town, nor *seventy-five acres* out of it. (V. C.

1873, ch. 76, §§ 8, &c., 12; V. C. 1887, ch. 64, §§ 1398 to 1403.)

The provisions with us touching the acquisition and control of property for the use of a church or religious congregation are of sufficient importance to merit a full exposition. The enactments are as follows:

“Every conveyance, devise or dedication shall be valid, which, since the first day of January, 1777, has been made; and every conveyance shall be valid which hereafter shall be made, of land for the use or benefit of any religious congregation, as a place for public worship, or as a burial place, or a residence for a minister, or for the use and benefit of any church or religious society, as a residence for a bishop or other minister or clergyman, who, though not in special charge of a congregation, is yet an officer of such church or religious society, and employed under its authority and about its business; and the land shall be held for such use or benefit, and for such purpose, and not otherwise.” (V. C. 1873, ch. 76, § 8; V. C. 1887, ch. 64, § 1398.)

But “such trustees shall not take or hold, at any one time, more than two acres of land in a city or town, nor more than seventy-five acres out of a city or town.” (V. C. 1873, ch. 76, § 12; V. C. 1887, ch. 64, § 1403.)

“When books or furniture shall be given or acquired for the benefit of such congregation, church, or religious society, to be used on the said land, in the ceremonies of public worship, or at the residence of the minister, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts.” (V. C. 1873, ch. 76, § 10; V. C. 1887, ch. 64, § 1401.)

And very similar provisions are made in favor of benevolent and of literary associations. (V. C. 1873, ch. 76, §§ 13-16; V. C. 1887, ch. 64, §§ 1407, 1399, 1402, 1405.)

The appointment and control of the trustees for such religious associations are as follows:

“The circuit or corporation court of the county or corporation wherein there may be any parcel of such land, or the greater part thereof, may, on application of the proper authorities of such congregation, from time to time, appoint trustees, either where there were or are none, or in place of former trustees, and change those so appointed, whenever it may seem to the court proper, to effect or promote the purpose of the conveyance, devise or dedication; and the legal title to such land shall, for that purpose, be vested in the said trustees for the time being, and their successors.

And if a division has occurred, or shall hereafter occur,

in any church or religious society to which any such congregation is attached, the *communicants, pew-holders and pew-owners of such congregation, over twenty-one years of age*, may, by a vote of the majority of the *whole number*, determine *to which branch of the church or society* such congregation shall thereafter belong. Such determination shall be reported to the said court, and if approved, shall be so entered on the minutes, and shall be *conclusive as to the title to and control of any property held in trust for such congregation*, and shall be respected and enforced accordingly in all the courts of this commonwealth. And if a division has heretofore occurred, or shall hereafter occur, in a congregation, which, in its organization and government, is *entirely independent of any other church, or general society*, a majority of the *members of such congregation* entitled to vote *by its ordinary practice or custom*, may *decide the right, title and control* of all property held in trust for such congregation; and their decision shall be reported to such court, and if approved by it, shall be so entered on the minutes, and *shall be final as to such right of property so held.*" (V. C. 1873, ch. 76, § 9; V. C. 1887, ch. 64, §§ 1398 to 1400.)

"The said trustees may, *in their own names*, sue for and recover such land or property, and be sued in relation thereto. Such suit, *notwithstanding the death* of any of the said trustees, or the appointment of others, shall proceed *in the names of the trustees* by or against whom it was instituted." (V. C. 1873, ch. 76, § 11; V. C. 1887, ch. 164, § 1402.)

It will be observed that these enactments thus far confer upon the trustees no power to *mortgage*, or in any wise to *charge* the property then held, not even under the instructions, nor by the expressed wish of the congregation for whose benefit it has been conveyed. And it might, upon principle, be doubted whether, as the trusts are so precisely defined by law, a court of equity would *independently of statute*, intervene to direct a sale or mortgage, when circumstances suggested the expediency of either, notwithstanding it is one of the most important functions of that court to supervise the administration of all trusts, and upon occasion, to instruct the trustee as to his duty. (Hill's Trustees, 42, 429 and notes; 2 Stor. Eq. §§ 976, 978, 979 a, 1059-1061; 2 Min. Insts. 205-207, 362.) Supposing such doubt to be well-founded (although it may appear to be, to some extent, resolved by the case of Linn v. Carson, 32 Grat. 182-184), the only recourse is to apply to the legislature, which it would seem is, by the constitution, expected to give relief, not by a *special act* in each case, but by a *general law*, to be applied by the courts,

although in point of fact great numbers of special acts have been made. (Va. Const. 1869, Art. V., § 20; Va. Const. 1851, Art. IV., § 35.) Accordingly it is enacted that—

“Whenever any *religious congregation*, benevolent or literary association, *for whose use* a conveyance, devise or dedication *of land* has been lawfully made, shall deem their interests will be promoted *by a sale* of such land, or by the execution of a *mortgage or deed of trust thereon*, it shall be lawful for *any member* of such congregation, benevolent or literary association, *in his name*, and on *behalf of the other members* thereof, to prosecute a *suit in equity* for either of said purposes, in the *circuit or corporation court* of the county or corporation in which such land, or the greater part thereof, may lie, *against the trustees* or survivors of them in whom the legal title may be; and it shall be lawful for such court, *if a proper case be made*, and the court be of opinion that the *rights of others will not be violated thereby*, to order the sale of such land, or the execution of such *mortgage or trust*, and make such disposition of the proceeds of such sale, mortgage or trust as the *congregation*, benevolent or literary association *may require*.” And a like proceeding may be had at the instance of the trustees. (V. C. 1873, ch. 76, § 13; Acts 1878-'9, p. 161, ch. 181; V. C. 1887, ch. 64, §§ 1405, 1406.)

In view of these provisions, there would seem to be no need of *special legislation* in such cases, and if so, such legislation is prohibited by the clause of the constitution above cited, which declares that the general assembly “shall not, by *special legislation*, grant relief . . . in any . . . case of which the courts or other tribunals *may have jurisdiction*.”

Let us see now what view has been taken by the courts, of the foregoing series of statutes in connection with the pre-existing law, noting (1), The state of the law anterior to the enactment of those statutes; (2), The subjects of conveyance contemplated by the statutes; (3), The mode of conveyance designed; and (4), The objects and purposes intended.

(1), *The State of the Law, Anterior to the Enactment of the Statutes mentioned above.*

Apart from the statutes, the law does not permit any unincorporated association, religious or other, to take either the legal or the equitable title to any property whatsoever, either directly or through the medium of trustees, by any manner of conveyance, whether will or deed, the reason being the uncertainty and indefiniteness of the elements which compose such an association. (Bapt. Association

v. Hart, 4 Wheat. 1; Gallego v. Atto, Gen. 3 Leigh, 461-462, 465-6 & seq.; Brook v. Shacklett, 13 Grat. 309-10. If such gifts, therefore, are valid, it is because they come within the provisions of these enactments; and hence it is needful to observe closely the terms of the statutes, as we shall presently see.

(2), *The Subjects of Conveyance Contemplated by the Statutes.*

The statutes make mention of no other subjects but *lands*, of which any *estate* may be conveyed, but the *quantity* must not exceed *two acres* in an incorporated town, and *seventy-five acres* not in such a town; and of *chattels*, only *furniture and books*, to be used *on the land* in the *ceremonies of public worship*, or at the *residence of the minister*.

(3), *The Mode of Conveyance Designed.*

The first act which secured property to church-congregations was that of February 3, 1842 (Acts, 1841 '2, p. 60, ch. 102). Before that time such property was held by a precarious tenure, through trustees, who were amenable to no legal authority for the enforcement of their obligations, the sole protection to the churches being a very strong public sentiment in their favor.

By the act of 1842, it was declared that "when any lot or part of a lot, tract or parcel of land has been *heretofore conveyed or devised*, or shall *hereafter be conveyed or devised* to one or more trustees for the use or benefit of any religious congregation, as and for a *place of public worship*, the same and all buildings and other improvements thereupon, shall be held by such trustee or trustees (and their successors) for the purposes of the trust, and not otherwise;" and a proviso was appended limiting the quantity of land to be held by such trustees to *thirty acres* in the country, and *two acres* in an incorporated town, and enacting that such real property shall not be held by them "for any other use than as a *place of public worship, religious or other instruction, burial ground, and residence of their minister.*"

The revisal of 1849 improved this crude legislation by enacting (V. C. 1849, ch. 77, §§ 8, 10) as follows:

"§ 8. Every *conveyance, devise or dedication*, shall be valid which, since the first day of January, 1777, has been made, and every *conveyance* shall be valid which *hereafter* shall be made, of land for the use or benefit of any religious congregation as a *place for public worship*, or as a *burial place* or a *residence for a minister*; and the land shall be held for such use or benefit, and for such purpose, and not otherwise.

"§ 10. When *books or furniture* shall be given or acquired for the benefit of such congregation, to be used *on*

the said land in the ceremonies of public worship, or at the residence of their minister, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, for the benefit of the congregation."

The act of 1867 (Acts, 1866-'7, p. 907, ch. 107), which is incorporated in the Code of 1873 (V. C. 1873, ch. 76, § 8), modifies these latter only so far as to declare that every conveyance shall be valid which *hereafter* shall be made of land for the use or benefit of any religious congregation, as a place for public worship, or as a burial place, or a residence for a minister, *or for the use or benefit of any church or religious society, as a residence for a bishop or other minister or clergyman, who, though not in special charge of a congregation, is yet an officer of such church or religious society, and employed under its authority and about its business."* And so far the law continues unchanged to the present time. (V. C. 1887, ch. 64, § 1398.)

It is apparent from the terms of these later statutes that, since the first day of July, 1850, when the Code of 1849 took effect, no lands can be vested in church congregations otherwise than by conveyances, that is, transfers from *living* persons and *not by devise nor dedication*; and as all conveyances, devises and dedications to or for the benefit of such congregations, prior to February 3, 1842, were devoid of any legal effect, it is not easy to see how the statute in question could give vitality to them retrospectively, especially in the case of devises. Parties who, at the date of the statute, possessed legal claims to such lands, could not, by the act, have those claims divested. The lapse of time, however, has doubtless practically settled any question of this sort; and as between the trustees and the beneficiaries, and amongst competing beneficiaries themselves, such question was quite ignored in *Brooke v. Shacklett*, 13 Grat. 301, and in *Hoskinson v. Pusey*, 32 Grat. 428.

No particular mode of acquiring *books and furniture* (the only *chattels* allowed to be acquired) is prescribed. It may therefore be by gift or purchase *inter vivos*, or by will. (V. C. 1849, ch. 77, § 10; V. C. 1873, ch. 76, § 10; V. C. 1887, ch. 64, § 1401.)

(4), *The Objects and Purposes intended by the Statutes.*

The first act upon the subject, that of February 3, 1842, defined, with accuracy and precision, the purposes for which a church-congregation might acquire both lands and chattels, that is, books and furniture, namely,—*lands*:

- 1, As a place *for public worship*;
- 2, As a *burial place*; and
- 3, As a *residence for a minister*; and for no other use or purpose.

And as to *books and furniture*, the Code of 1849 allowed them to be acquired,

For the benefit of such congregation, church or religious society, to be used on the *said land* in the *ceremonies of public worship*, or at the *residence of the minister*. (V. C. 1849, ch. 77, § 10.)

The subsequent act of April 26, 1867, which (having been substantially re-enacted in the Code of 1887), is now the law, and has been above (p. 540) set forth *in terms*, besides the three just mentioned, adds one other purpose for which *lands* may be acquired, namely:

4. For the *use or benefit of any church or religious society* as a *residence for a bishop, or other minister or clergyman*, who, though *not in special charge of a congregation*, is yet *an officer of such church or religious society, and employed under its authority and about its business*. (Acts 1866-7 p. 907, ch. 107; V. C. 1887, ch. 64, § 1398.)

Both acts are scrupulous in declaring that the *land* "shall be held for *such use or benefit and for such purpose, and not otherwise*," whilst they provide that the "*books or furniture*" given or acquired for the benefit of such church-congregation, shall stand vested in the trustees having the legal title to the land, to be held by them *as the land is held, and upon the same trusts*." (V. C. 1873, ch. 76, §§ 8, 10; V. C. 1887, ch. 64, §§ 1398, 1401.)

If any other purposes and objects than those above designated shall be aimed at, the conveyance is as to such purposes at least as void as if the statutes had not been enacted. (*Brooke v. Shacklett*, 13 Grat. 313.)

The "religious congregations" intended, include as well those which are united with others under a common government, as those which are independent or *congregational* in their organization and government. The phrase, however, does not apply to whole denominations or sects, but is to be understood in the limited and local sense of the words, so as to restrict the benefit of such conveyances to single congregations, whose *members*, from their residence at or near the place of public worship, may be expected to use it for such a purpose. Hence, no conveyance can be maintained as within the protection of the statute, which does not respect the rights of the local society or religious congregation, and which does not design to bestow the property for the use or benefit of that society or congregation. (*Brooke v. Shacklett*, 13 Grat. 313 & seq.; *Hoskinson v. Pusey*, 32 Grat. 431; *Gibson v. Armstrong*, 7 B. Monr. (Ky.) 481. See *Den v. Bolton*, 7 Halst. (N. J.) 215.) But let it be observed that the conveyance is not the less for the use and benefit of the local society, that by its terms it contemplates and sanctions the appoint-

ment of a minister, with authority to officiate in the intended place of worship, by a power outside of the congregation (as in case of a Methodist church, by the conference), without reference to the congregation's vote or wish. (*Brooke v. Shacklett*, 13 Grat. 314 & seq.) It could not have been unknown to the legislature that many religious congregations in the State are so situated, and it is inadmissible to impute a design to make an unjust and invidious discrimination, in respect to a provision of this character, against such congregations, and in favor of those who select their own pastor. A deed, therefore, is within the operation of the statutes which conveys real property in trust for a local religious congregation, and provides that the trustees shall at all times permit the ministers belonging to the Methodist Episcopal Church, who shall be duly authorized by the conference of the church to preach in the house; so that whatever question may arise as to the right of a minister to preach there, it is to be determined, not by inquiring whether he represents the wishes of a majority of the members of the society, but whether he has been appointed and assigned to the society in accordance with the laws of the church. (*Brooke v. Shacklett*, 13 Grat. 317-'18.)

It will be remembered (*Ante*, pp. 540-'41), that the statute (first enacted in 1867) takes notice of the fact that *divisions* had occurred "in some churches or religious societies to which such congregations *have been attached*, and such divisions may hereafter occur," and provides that "it shall, in any case, be lawful for the *communicants and pew-holders and pew-owners, over twenty-one years of age*, by a vote of the majority of the whole number, . . . to determine to *which branch* of the church or society such congregation shall thereafter belong;" which determination, being reported to and approved and entered of record by the circuit or corporation court charged with the cognizance of the matter, is conclusive as to the title to and control of any property held in trust for such congregation. And that, in the case of a *congregational* or independent church, it is provided that where such divisions occur, a "majority of the *members thereof*, entitled to vote by the *ordinary practice or custom* of such church or society, shall decide the right, title and control of *all property* held in trust for such congregation and their decision shall be *reported to such court*, and if approved by it, shall be so entered on the minutes, and shall be final as to such right of property." (V. C. 1873, ch. 76, § 9; V. C. 1887, ch. 64, § 1400.)

Having regard to these provisions, no question, it is supposed can be raised, that when a division takes place in a religious society composed of many congregations, each

congregation will determine for itself to which party it will adhere, and consequently the disposition of the property held in trust for its use and benefit, by the vote of a majority of the *communicants, pew-holders and pew-owners over twenty-one years of age*; whilst if the society be composed of but one church-congregation, whose government is independent or *congregational*, the voters to decide are the *members of the congregation* entitled by the *constitution*, or if there be no written constitution, *by usage and practice*, to vote. But prior to the enactment of this statute, on February 18, 1867, no provision was made by statute for the allotment of church property upon the occurrence of divisions in the societies to which the property belongs, and so the courts were left to determine the principles of the allotment upon the general doctrines of equity. The two cases of *Brooke v. Shacklett*, 13 Grat. 320-21 & seq., and of *Hoskinson v. Pusey*, 32 Grat. 431-'2, arose before the act of 1867 was made, and were decided, of course, without reference thereto. Those cases held that, in the absence of any statutory direction as to who should vote in cases of division, it must be the *members* of the local religious society; and that, in order to constitute a *member*, two points at least are essential, without meaning to say that others are not so, namely, a profession of the society's faith, and a *submission to its government*, (*Den v. Bolton*, 7 Halst. (N. J.) 215; *Brooke v. Shacklett*, 13 Grat. 320; *Hoskinson v. Pusey*, 32 Grat. 431.) Hence, when, in 1844, the Methodist Episcopal Church in the United States, finding itself hampered in its usefulness by dissensions touching the lawfulness of slavery in a scriptural point of view, by an ordinance of its general conference, empowered the Southern conferences to organize separately (which was done accordingly in 1845), and permitted the border-conferences and border-congregations to choose to which division they would respectively adhere, it was considered that no church-congregation, save as authorized by that ordinance, could change its church-relations, and that when, upon such authority, the relations were changed, the members who did not conform thereto, having declined *submission to the government* of the church, were not such members as could be allowed a voice in disposing of the property. (*Brooke v. Shacklett*, 13 Grat. 323-'4, 327-'8; *Hoskinson v. Pusey*, 32 Grat. 431-'2, 438-'9, 440. See also *Smith v. Swornstadt*, 16 How. 288; *Gibson v. Armstrong*, 7 B. Monr. (Ky.) 481.)

The withdrawal by one part of a church-congregation from the body of it, and uniting with another church or denomination, is a relinquishment of all rights in the property of the church abandoned; but the mere periodical

assembling for worship in another building, of a majority of the society, which in its organization and government is independent or *congregational*, when such majority has been forcibly and illegally excluded from their own rightful church-edifice, is not such a relinquishment; and such majority, supposing it to have retained its old organization, trustees and officers, is entitled to assert in the civil courts its right to the church property; for in a *congregational* church, the majority of the *members*, as long as they adhere to its organization and doctrines, represent, or constitute the church. (Bouldin v. Alexander, 15 Wal. 137, 140.)

When a member of a church-congregation is excommunicated by competent church authority, the civil courts cannot go behind that authority, and inquire whether or not he has been irregularly excommunicated; but they are at liberty to inquire whether the excommunication was the act of the *church* or of persons who, not being the church, had no power to excommunicate. (Bouldin v. Alexander, 15 Wal. 139-'40; Shannon v. Frost, 3 B. Monr. (Ky.) 253.)

It may be observed, that the trustees of a church-congregation are not removable at the mere instance of the body, but only for satisfactory cause shown to the court of chancery (Bouldin v. Alexander, 15 Wal. 137), a proposition which is also affirmed in substance by our statutes. (V. C. 1873, ch. 76, § 9; V. C. 1887, ch. 64, § 1399.)

Where a contest arises as to the true ownership of a church-house, between two sets of trustees, the same general principles and rules apply as in a controversy between individuals. Hence, if the plaintiffs have put the others into possession of the premises for a time, or at will, and the latter have acknowledged the title of the plaintiffs, the possession of the defendants is the possession of the plaintiffs until the former, by some act, disclaim to hold of the latter, and full notice thereof be given to the plaintiffs; and no adverse title can be set up by the defendants, growing out of the possession merely, until such adverse possession has continued sufficiently long by the statute of limitations applicable to the action, to bar the plaintiff's claim. (Allen v. Paul, 24 Grat. 541-'2.)

2^d. Lay Corporations.

Lay corporations are corporations intended for *secular purposes*, or as is sometimes said, not very accurately, are composed of *secular* and *not clerical persons*. They are either *civil* or *eleemosynary*. (1 Bl. Com. 470.)

W. C.

1^o. Civil Corporations.

The doctrine touching civil corporations may be presented under the heads following, namely, (1), The na-

ture of a civil corporation; (2), Advantages of corporations in connection with business purposes; (3), Special and limited partnerships; and (4), Joint-stock companies: W. C.

1st. The Nature of a Civil Corporation.

A civil corporation (which may be either *public* or *private*) is one created for *any secular purpose*: e. g., for governmental purposes, such as the king, cities, counties, etc.; for the *advancement of trade, manufactures, etc.*, such as the East India Company, manufacturing companies, banking companies, etc.; for the *advancement of learning*, such as universities, colleges, library companies, the Royal Society, etc.; or for purposes of *general improvement, etc.*, such as canal, bridge, railroad companies, etc. (1 Bl. Com. 470-71; Ang. & Ames, Corp. (10th ed.) 840.)

2^d. Advantages of Corporations in Connection with Business Purposes.

The advantages of a corporation for the transaction of business in comparison with an ordinary partnership, may be summed up under the heads following:

W. C.

1st. Any Number of Persons may Unite in an Enterprise without Inconvenience, Contracting, Suing, and being Sued, in the *Corporate Name*.

2nd. The Shareholders may Dedicate to the Undertaking such Amount as each thinks fit, and that, at *Common Law*, is the *Limit of his Responsibility*.

It must be observed, however, that in several of the States, as in New York and Massachusetts, and in others also, the policy has prevailed for many years of holding to more or less of personal liability, over and above their shares, usually to an amount equal to their shares, those persons who were members of the company at some certain period, in some instances at the period of its *dissolution*, in others, more rationally, at the *date of the engagement* sought to be charged. (Ang. & Ames Corp. (10th ed.) §§ 605 & seq., 610 & seq.) The act of congress creating a system of national banks provides that "the shareholders of each association," organized under the act, "shall be held individually responsible, equally and ratably, and *not one for another*, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." (13 U. S. Statutes, 102, § 12; Rev. Stats. U. S. § 5151.)

Virginia had once adopted this policy in respect to corporations *created by the circuit courts*, as presently to be mentioned, as to which it was enacted, that

"for all debts which shall be due and owing by the company, the persons composing the company, *at the time of its dissolution*, shall be individually responsible to the extent of their *respective shares of stock* in said company, and no further." (V. C. 1873, ch. 57, § 63.) The effect of this enactment was to make the shareholders, at the time of the dissolution of the company, answerable for its debts and engagements to an extent equal to the amount of their respective shares, *over and above the same*. (Briggs v. Penniman, 8 Cow. (N. Y.) 387, 396; Spear v. Crawford, 14 Wend. (N. Y.) 30; Bank of Poughkeepsie v. Abbotson, 24 Wend. 473, 479; S. C. 5 Hill, 451; Slee v. Bloom, 19 Johns. (N. Y.) 456; Castleman v. Holmes, 4 J. J. Marsh. (Ky.) 1; Johnson v. Somerville & Co. 15 Gray, (Mass.) 216; Anderson v. Com'th. 18 Grat. 205; Mills v. Stewart, 41 N. Y. 384.) But this provision has been repealed, so that the common law doctrine is restored. (Acts 1874, p. 182, ch. 167.) Let it be observed, however, that where there is reserved to the legislature the power of modification or repeal of the charter at pleasure, the shareholders may by statute be made personally liable for all debts *thereafter* contracted by the corporation, and amongst the rest for taxes assessed upon it. (Stanley v. Stanley, 26 Maine, 191; Sherman v. Smith, 1 Black. 587; Anderson v. Com'th, 18 Grat. 299, 300.) Thus when the shareholders of express and transportation companies were made liable for the taxes imposed on the business of the companies, and for the penalties for non-payment thereof (a provision now omitted), this liability was held to apply as well to companies existing when the act was passed as to those created afterwards. (V. C. 1873, ch. 33, § 96; Anderson v. Com'th, 18 Grat. 299-300.) And in all cases each stockholder is liable individually, to the *extent of his stock*; for the debts of the corporation. (Hardy v. Norfolk Man. Co., 80 Va. 416; Sawyer v. Hoag, 17 Wal. 610; Patterson v. Lynde, 106 U. S. 521.)

- 3^g. Shares in Virginia are *Personal Property* Always, and are Susceptible of Easy Sale and Transfer by the Holder or *his Representative*.

This, as we have seen (*Ante*, p. 531), is supposed to be a doctrine of the common law, but with us it is enforced by statute. (V. C. 1873, ch. 57, §§ 21, 63; V. C. 1887, ch. 47, §§ 1125, 1149; Bac. Abr. Corp. (E.) 5.)

- 3^f. Special and Limited Partnerships; w. c.

- 1^g. Special Partnerships.

Special partnerships are a statutory substitute for some of the advantages of corporations, namely, the advantage of *limited responsibility*, and of suits in the

name of one or a few. They are unknown to the common law, which holds every associate in business, who *shares its gains*, in whatever proportion, liable to the full extent of his entire estate for the obligations contracted. Special partnerships were introduced into France in 1673, and have found considerable favor in many of these States, and, amongst others, in Virginia. "Limited partnerships," says the statute (V. C. 1873, ch. 142, §§ 1, &c.; V. C. 1887, ch. 135, §§ 2863, &c.), meaning thereby *special* partnerships, "for the transaction of *mercantile, mechanical or manufacturing business within this State*, and not for the purpose of banking, brokerage, or making insurance, may be formed upon the terms and subject to the conditions and liabilities prescribed" in the statute. There must be one or more persons liable as *general partners*, and then there may be one or more special partners, who, contributing a *specific sum in cash*, as capital, shall not be personally liable for the debts, except in a few specified cases. The persons forming such partnership are required to sign a paper, stating the name and place of residence of each partner, the name or firm under which the partnership is to be conducted, who are the general and who the special partners, the sum which each special partner contributes, the general nature of the business to be transacted, the place or places of the said business, and the duration of the partnership. One or more of the general partners is also required to make oath that each sum so stated to be contributed has been *actually paid in cash*. But still the partnership is not to be deemed to be formed until such paper and such oath, duly certified to have been acknowledged or proved, as in the case of a power of attorney, shall be admitted to record as to each person signing the same, in the court, or in the clerk's office of the court, of each county or corporation in which may be the place or places of business; nor until such paper and certificate of oath be published for four successive weeks in a newspaper, if any, printed in every such county or corporation; and if no newspaper be published there, then posted for four successive weeks at the front door of the court-house of such county or corporation. If such publication or posting be not made, the partnership shall be deemed *general*; and if any statement in such paper or certificate be false, the *special* shall be liable as *general* partners. (V. C. 1887, ch. 135, §§ 2866 to 2868.)

The general partners alone can conduct the business of the concern, and *suits are to be brought by or against*

them. The capital originally contributed by the special partners is *not to be diminished* by the withdrawal of any part thereof, and if it be, there can be no division of interest or profits until the original capital is restored, nor is any sale or transfer of, nor lien on the assets legal, for the purpose of giving preference amongst creditors; nor, finally, can there be any dissolution of a special partnership before the time specified in the articles, unless notice thereof be recorded and published, as the formation of the partnership is required to be. See Ang. & A. (10th ed.) §§ 42 & seq.; Vol. IV., p. 1319, Form.

2^g. Limited Partnerships.

A later statute (March, 1875; V. C. 1887, ch. 135, §§ 2878 & seq.) authorizes a *limited partnership* of a different character, "for the purpose of conducting *any lawful business or occupation* within this State or elsewhere, whose principal office or place of business shall be established and maintained within this State."

The *capital* only which is subscribed by the members of the association is liable for the debts of the association, which is constituted by the persons belonging to it, three or more, signing and acknowledging before some officer competent to take acknowledgment of deeds, a statement in writing, setting forth the proper names of such persons; the amount of capital subscribed by each; the total amount of capital, and when and how to be paid; the character of the business to be conducted, and the location of the same; the name of the association, with the word "*limited*" added thereto as a part of the same; the contemplated duration of the association in no case to *exceed twenty years*; and the names of the officers of the association, selected in conformity with the provisions of the act; and any amendment of such statement is to be made only in like manner; the statement and amendments to be recorded in the deed-book of the county or corporation where the principal office is established. Each partner must in the statement agree to waive the benefit of the homestead exemption as to any debt which he may at any time owe the association. And the statement is required to be published once a week for two weeks, in a newspaper published in the county or city in which is the principal office. See 4 Min. Insts. p. 1320, Form.

The word "*limited*," it is declared, shall be the last word of the name of every such association; and the omission of it in the use of the name of the partnership shall render every person who participates in such

omission, or acquiesces therein knowingly, liable for any indebtedness or damage thence arising.

Interests in such associations are personal estate, and may be transferred as the by-laws direct. The business is to be conducted by managers elected by the stockholders, but the capital is not to be impaired.

These provisions are taken substantially from English statutes of 1862, 25 & 26 Vict. c. 89. (V. C. 1887, ch. 135, §§ 2878 & seq.; Wms. Pers. Prop. 201 & seq.)

4^t. Joint-Stock Companies.

Joint-stock companies constitute a device whereby capital is sought to be concentrated upon enterprises of magnitude beyond the power of single persons, or of only a few to accomplish. They are much employed in England, and are regulated there by a long succession of statutes, now virtually consolidated into 25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131, of which the first provides for their formation and their registry in a public office, and the second regulates the mode in which they shall contract and transact business, the effect appearing to be to render valid any agreement made in behalf of such a company which would be valid if it had been made in like manner by a private person. (1 Chit. Cont. (11 Am. ed.) 384; 2 Do. 1012 '13.)

Such associations are comparatively little known with us, at least *by that name*, although in some particulars the special and limited partnerships above described bear a very close resemblance to them. Where there are statutes regulating them, the statute must be looked to to determine the relations and liabilities of their members; but independently of statute, when the association grows out of mere private agreement, it is in effect a *partnership*, and as in other partnerships, each individual member is in general responsible personally (whatever private arrangement there may be to the contrary between the associates), for all the debts of the concern. (Ang. & A. Corp. (10th ed.) § 591; 3 Kent's Com. (12th ed.) 26, 27, and notes.)

A joint-stock company differs from an *ordinary* partnership in the particulars following:

- (1), The great number of its members:
- (2), Certain peculiar regulations adopted for the government of the concern, which are usually contained in an instrument of writing styled a *deed of settlement*, to which is sometimes added an act of the legislature, or letters patent, in pursuance of such an act:
- (3), The vesting of the power to make contracts, and to manage the business of the association, not in the individual members, but in a board of directors or managers, or in a single person; and

(4), The permission given it by the legislature, or by the letters patent, to carry on suits, as plaintiff or defendant, in the name of the secretary, or of some officer of the company, instead of in the name of all the members, as would otherwise be necessary. (Smith's Merc. Law, 101; 3 Kent's Com. (12th ed.) 26-'7; Ang. & A. Corp. § 591.)

But whilst it is the established doctrine in respect to such an association, that each member is liable in general for all its debts and engagements, which liability cannot be obviated nor qualified, save as between the partners themselves, by any stipulation to the contrary (3 Kent's Com. (12th ed.) 26-'7, and notes; Holmes v. Higgins, 1 B. & Cr. (8 E. C. L.) 74; Smith v. Hull Glass Co. 11 C. B. (73 E. C. L.) 897; Peel v. Thomas, 15 C. B. (80 E. C. L.) 714, 719; Gordon v. Sea, Fire, Life Ins. Co. 1 H. & N. 599; Greenwood's Case, 3 De G. M. & G. (53 Eng. Ch.) 475, 477, 491), yet there seems reason to believe that where there is a stipulation in the deed of settlement, or articles, limiting the responsibility of the members to the joint-funds, or otherwise to a qualified extent, it will be binding upon those creditors who *have notice* of such stipulation, and contract their debts with reference thereto. (3 Kent's Com. (12th ed.) 26-'7, and notes; Stor. Partnership, § 164; Kess v. Wests, 4 S. & R. (Pa.) 361; Skinner v. Dayton, 19 Johns. (N. Y.) 537.) And upon reason and authority, it would appear that persons dealing with the company are bound to inform themselves of the contents of the deed of settlement, or articles of association, supposing the same to have been *registered in a public office*. (Royal Brit. Bank v. Turquand, 6 El. & Bl. (88 E. C. L.) 332; Ridley v. Plymouth G. & B. Co. 2 Excheq. 711, 718; Balfour v. Ernest, 5 C. B. N. S. (94 E. C. L.) 624.)

2°. Eleemosynary Corporations.

Eleemosynary corporations are constituted for the distribution of the *free alms* of the founder to such persons as he has directed. Of this kind are hospitals for the poor, sick, and impotent; asylums for orphans, and such incorporated schools as dispense education and maintenance, or either, gratuitously. Hence, the *colleges* in the two English universities (which originally were merely *endowed boarding houses*, where board was afforded gratuitously), and many similar institutions scattered through Great Britain, are properly eleemosynary foundations, having been established for two purposes, namely: (1), For the promotion of piety and learning, by proper regulations and ordinances; and (2), For imparting pecuniary aid to the members of those bodies, to enable them to

prosecute a life of devotion and of study (*ad orandum et studendum*), with greater ease and assiduity. (1 Bl. Com. 471.)

These collegiate eleemosynary corporations in England may be composed of ecclesiastical persons, principally or wholly, and they may in some things partake of the nature, etc., of ecclesiastical bodies, but they are, notwithstanding, recognized as *lay*, and *not ecclesiastical* corporations, because they are not erected *primarily* for the advancement of religion. (1 Bl. Com. 471; Phillips v. Bury, 1 Ld. Raym. 6.)

Colleges in the United States are, in general, like the English universities, *not eleemosynary*, but *civil* corporations; not eleemosynary in respect to the *instructors and officers*, because, although they have stipends assigned them from the funds of the institution, yet these are rewards *pro opere et labore*, not charitable gratuities, every stipend being conditioned on service and duty; nor eleemosynary in respect to the *pupils*, because, whilst the endowment sometimes enables and induces the college to afford board and instruction at reduced rates, they are seldom purely gratuitous. When, however, they, or either of them, are gratuitous, the corporation is to that extent eleemosynary. (1 Bl. Com. 471; Dartmouth Coll. v. Woodward, 4 Wheat. 681.)

It is a noteworthy peculiarity of eleemosynary corporations, that they have not, like other corporate bodies, the *incidental* power of legislation. They are the mere creatures of their founder, and he alone can prescribe the regulations according to which his charity shall be applied. His statutes are their laws, which they have no power, unless by plain allowance from him, to alter, modify or amend. (Ang. & A. Corp. (10th ed.) § 330; St. John Coll. v. Todington, 1 Burr. 201; Green v. Rutherford, 1 Ves. Sr. 462.) A delay to make such regulations for a few years after the foundation does not affect the right or power to make them; but after the founder has given the body of statutes or ordinances, according to the power reserved to him, he is *functus officio*, and neither he, nor his successor as visitor, can add to or alter them, without express reservation of authority so to do. (Ang. & A. Cor. (10th ed.) § 330; Reg. v. God's Gift in Dulwich, 17 Q. B. (79 E. C. L.) 622 & seq.; Atto. Gen. v. Dulwich Hospital, 4 Beav. 261; Bentley v. Bishop of Ely, 2 Stra. 913; Atto. Gen. v. Earl of Clarendon, 17 Ves. 498, &c.)

3^b. The Creation and Organization of Corporations; w. c.

1^c. The Creation of Corporations; w. c.

1^d. Mode of Creating Corporations; w. c.

1^e. Mode of Creating Corporations in England.

In England, corporations are created by the king alone, or by the king in conjunction with the parliament, that is, *by statute*, to which the king's assent is necessary. But the king's consent to the creation of a corporation may be as well *implied* as express. Thus, the king's consent is implied in the case of those corporations which exist at common law, such as bishops, parsons, church wardens, and the king himself, all of whom, from time out of memory, have been held to be corporations *virtute officii*. Another method of implication of the king's consent to corporations is *by prescription*, or immemorial usage, as in the case of the City of London, and many others, which have existed as corporations time whereof the memory of man runneth not to the contrary. (1 Bl. Com. 472-'3; Town of Pawlett v. Clark, 9 Cr. 292.)

The *proper words* of creation (although by no means indispensable), are *creamus*, *erigimus*, *fundamus*, *incorporamus*, and the like; but so far are these words from being indispensable, that a corporation may be created by mere inference, from the general effect of a royal grant, if such seems to be the *intent*. Thus, a grant to certain persons to have "*gildam mercatoriam*," a mercantile fraternity or company, or *guild*, is sufficient to incorporate them for ever; and so with every other act of sovereign authority, which treats several persons in a collective capacity as *one body*. (1 Bl. Com. 474; Bac. Abr. Corporations, (B.); Sutton's Hospital, 10 Co. 29 b, 30 a, 30 b, 28 a; Tone Conservators v. Ash, 10 B. & Cr. (21 E. C. L.) 349; 2 Wend. (N. Y.) 109; 2 Johns. C. R. 325; Stebbins v. Jennings, 10 Pick. (Mass.) 188.)

The power of erecting corporations may be exercised by the king (and *a fortiori* by parliament), *through* individuals, upon the maxim *qui facit per alium facit per se*. Thus, the chancellor of the University of Oxford has power by the charter to erect corporations subservient to the needs of the students, and has often exerted it. (1 Bl. Com. 474; Ang. & A. Corp. (10th ed.) §§ 74, 75.) And so with us, as we shall presently see, the legislature has thought fit to confer on the *circuit and corporation courts and judges* the power to create most classes of corporations. (V. C. 1873, ch. 57, §§ 59, &c.; V. C. 1887, ch. 47, §§ 1145, & seq.)

2°. Mode of Creating Corporations in Virginia.

Corporations with us are created always, either directly or indirectly by an act of the legislature, or in pursuance of the authority of one. Formerly, a *special act* was required in each case; but by an act of May 20, 1852 (which, though the legislature has often since acted upon the subject, has never been repealed), provision was

made to allow any number of persons, *not less than nine*, to become, in the manner prescribed, an *incorporated company*, for the purpose of accumulating a fund to enable its respective members to purchase houses and lots, erect buildings, improve lands, and to remove encumbrances from real estate: and for the further purpose of distributing among the members who do not receive aid by advances on their shares for the objects aforesaid, their proper dividends of the fund so accumulated in money. The act requires the articles of association, attested by the signatures of the officers and trustees, and verified by the oath or affirmation of the president and secretary, to be recorded in the court of the county or corporation in which the association shall transact its business. And thereupon, the persons who have *subscribed the articles of association*, and such other persons as shall become members thereof, and their successors, *shall be a body corporate*, by the name specified in the articles. The statute also contains copious directions for the organization and management of the company and its concerns, for which reference must be made to the act itself. (Acts 1852, p. 81, ch. 101.) An association of this sort, organized in 1872, without any authority save from the act of 1852, was held to be a legal and valid corporation, notwithstanding the numerous intervening laws touching the creation of corporations by the circuit courts, and it was pointed out that not only had there been no repeal of the act of 1852, but that it had been recognized as a still subsisting law so lately as by Acts 1879-80, p. 84, ch. 110. (Davies v. Creighton, 33 Grat. 702 '83.)

The act of 1852 being still in force, it may be worth while to refer, besides the case just cited, to the following cases, where the rights and obligations of this class of corporations have passed under review, namely: Christian v. Cabell, 22 Grat. 82; White v. Mechanics' Build. Fund Assoc. 22 Grat. 233; Edelin v. Pascoe, 22 Grat. 826; Winchester Build. F. Assoc. v. Gilbert, 23 Grat. 787.

But besides the act of 1852, we have a series of statutes, beginning with that of March 3, 1854, whereby provision is made for incorporating joint-stock companies by order of the *circuit or corporation courts, or of the judges thereof in vacation*, "for the conduct of any enterprise or business which may be lawfully conducted by an individual, or by a body politic or corporate, *except to construct a turnpike to be constructed beyond the limits of the county, or a railroad or canal, or to establish a bank of circulation.*" (V. C. 1873, ch. 57, § 59; V. C. 1887, ch. 47, § 1145), in which cases the corporation can still be created only by *special act of assembly*.

The proceedings to obtain an order of incorporation from the circuit court, or the judge in vacation, are described by the statute as follows, viz :

“Any five or more persons may make, sign, and acknowledge before any justice, or notary, or county or corporation judge, or clerk of a county, corporation, or circuit court, a certificate in writing, setting forth the *name, the purposes, the capital stock and its division into shares, the amount of real estate* proposed to be held, the *place of the principal office, the chief business* to be transacted, and the *names and residences of the officers* for the first year of the company. This certificate may be presented to the *circuit or corporation court* of the county or city in which the principal office is to be located, or to the *judge thereof in vacation*; and thereupon the charter may be granted or refused upon the terms set forth in the certificate, or upon such other terms as may be adjudged reasonable. If the charter be granted, it is to be recorded by the clerk of the court in a book to be kept for the purpose, and certified to the secretary of the commonwealth, to be in like manner recorded *in his office*. And from the time the charter is lodged in the office of the secretary of the commonwealth, the persons who signed the certificate, and their successors, and such other persons as may be associated with them according to the provisions of the charter, are a body politic and corporate, by the name set forth in the certificate, with all the general powers, and subject to all the general restrictions provided by law previous or subsequent. The *circuit or corporation court*, or the judge thereof in vacation, may also, on the application of the company, authorized by a majority of the stockholders in general meeting, alter or amend the charter, or change the corporate name of the company; and the alteration or amendment is to be recorded by the clerk of the court and the secretary of the commonwealth, and from that time shall be as effectual as if originally a part of the charter.” (V. C. 1873, ch. 57, §§ 59 & seq.; V. C. 1887, ch. 47, § 1145.)

The reasons which would influence parties to form a *corporation*, instead of a *partnership*, to conduct any business or enterprise which may be lawfully conducted by an individual, that is, where to be such body politic constitutes the *only franchise* contemplated, are stated, *Ante*, p. 549.

As to the power of *congress* to create corporations, see *McCulloch v. State Bank of Maryland*, 4 Wheat. 424; *Osborn v. Bank of United States*, 9 Wheat. 738; *Ang. & A. Corp.* (10th ed.) §§ 72 '3.

In respect to the power of the States to create *banking corporations*, see *Briscoe v. Bank of Kentucky*, 11 Pet. 527; *Woodruff v. Trapnall*, 10 How. 205; *Darrington v. Bank of Alabama*, 13 How. 12; *Curran v. Bank of Arkansas*, 15 How. 308, 317 '18. The power seems indubitable, notwithstanding the State may be a shareholder in the bank, or even its exclusive proprietor. The doubt as to the power of a State to create a banking corporation, especially when it is itself the holder of *a part*, and much more of *the whole* of the stock, is occasioned by Art. I., § x. 1, of the U. S. Constitution, which declares that "No State shall * * * *emit bills of credit*," and applies, therefore, only to banks of *issue*, and not to those merely of *deposit and loan*. The supreme court, however, holds that where some security other than the faith and credit of the State is provided for the payment of the bank-bills issued, as in the shape of a capital-stock, the constitutional provision is not violated. A State, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its prerogatives, but lays down its sovereignty, in respect to the transactions of the corporation, and exercises no power or privilege which does not equally belong to a private person. (*Curran v. State Bank of Arkansas*, 15 How. 308 '9, 317 '18; *Briscoe v. Bank of Kentucky*, 11 Pet. 324; *Darrington v. State Bank of Alabama*, 13 How. 15, 16.)

On the other hand, certificates issued on the legislative authority of a State, by its public officers, and receivable in discharge of all taxes and debts due the State, and in payment of salaries of State officers, for the redemption of which the faith and funds of the State are pledged, being fitted for the purpose of ordinary circulation in place of currency, and so intended, are bills of credit, and are unconstitutional and void. (*Craig v. Missouri*, 4 Pet. 431 & seq.; *Briscoe v. Bank of Kentucky*, 11 Pet. 314, 318; *Darrington v. Bank of Alabama*, 13 How. 12; *Poin-dexter v. Greenhow*, 114 U. S. 284.)

2^d. The Circumstances which Accompany the Creation of a Corporation.

Sir Edward Coke enumerates the things which are *of the essence* of a corporation thus: 1st, *Legal authority* of incorporation; 2d, *Persons to be incorporated*, and that in two manners, *scil.* persons natural, or bodies incorporate and political; 3d, *A name* by which they are incorporated; 4th, *A place* whereby to distinguish its locality; and 5th, *Words sufficient in law*, but not restrained to any legal or prescriptive form of words. (*Sutton's Hospital*, 10 Co. 29 b, 30 a, 30 b, 28 a.)

Of these *the first and the fifth* have been adequately set forth. Somewhat remains to be said of the other three ;
W. C.

1^e. Persons to be Incorporated.

These may be either *natural persons* or *bodies politic*. (1 Bl. Com. 475, n. (2) ; Sutton's Hospital, 10 Co. 31 b ; Ang. & A. Corp. (10th ed.) §§ 95 & seq.) Even the State may be, in its corporate capacity, one of the members of a *private* corporation, in which case it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. (Bank of U. S. v. Planters Bank, 9 Wheat. 904, 907 ; Bank of So. Car., 3 McCord (S. C.), 377.)

There seems to be no sufficient legal reason why several corporations may not, like several natural persons, form *partnerships between themselves*, or with natural persons, in order to effectuate the *purpose of their creation*, and thus become mutually liable for the engagements of one another, and that without constituting, in their conjunct relation, one body politic. Thus, where several incorporated transportation companies (*e. g.*, railroad corporations) unite amongst themselves, or with natural persons, to constitute a continuous line, the stipulations connected with "through-tickets" or "through transportation," &c., are, or may be, binding *upon all*, when made by *any one*, each being the *agent of all*. (Railroad Co. v. Harris, 12 Wal. 85 ; Wilson v. Ches. & O. R. R. Co. 21 Grat. 665-'66 ; Gr. Wes. R. R. Co. v. Blake, 7 Hurlst. & Norm. 987. But see Ang. & A. Corp. (10th ed.) §§ 26, 272 ; Sharon Can. Co. v. Fulton Bank, 7 Wend. (N. Y.) 412 ; Pearce v. Madison R. R. Co. 21 How. 442.) It is, however, a mere question of corporate power, to be determined by a just construction of the charter of which the corporation is the creature ; the body possessing those properties and powers which the charter confers upon it, either expressly, or as incidental to its existence, and none others. (Head v. Prov. Ins. Co. 2 Cr. 127 ; Dartmouth Coll. v. Woodward, 4 Wheat. 636 ; Bank of U. S. v. Dandridge, 12 Wheat. 64 ; Bank of Augusta v. Earle, 13 Pet. 587 ; Pearce v. Madison, 21 How. 443.)

2^e. The Name of a Corporation.

A corporation must have a *name*, which is said to be "*the knot of its combination*," without which it could not perform its functions. (1 Bl. Com. 475 ; Sutton's Hospital, 10 Co. 28 b.) The name, however, may be *implied* as well as *express*. (Prest. & Coll. of Phys. &c. v. Salmon, 1 Ld. Raym. 681 ; S. C. 1 Salk. 191.)

And the name *must be observed—vigorously* in *judicial*

proceedings, and substantially in grants, obligations, etc. Greater rigor is insisted on in *writs and pleadings*, because a mistake committed in them may be corrected with little inconvenience, and generally without loss, and accuracy is desirable if it is to be attained without too great a sacrifice: whilst in grants and obligations, if the description is held to be insufficient, the benefit is irremediably lost: and, therefore, more latitude is allowed in the latter case. Thus, where *John*, Abbot of Worcester, by the name of *William*, Abbot of W., granted common of pasture to J. S., the grant was held to be good; for, although the *Christian name* was mistaken, there was sufficient certainty in the designation *Abbot of W.* to ascertain who was the grantor intended: but if the name had been thus mistaken *in a writ or pleading*, it had been fatal. (Bac. Abr. Corp. (C.) 3; Ang. & A. Corp. (10th ed.) §§ 99 101; Finch's Case, 6 Co. 65 a. 65 b; Mayor, &c. of Lynne Regis. 10 Co. 126 a; Dean, &c. of Norwich Case, 3 Co. 75 a, n. (E).)

In *judicial proceedings*, where the corporation is a *party*, a mistake in the name can, at common law, be taken advantage of only by a plea *in abatement*, unless the mistake be so entire that no such corporation exists as that described, in which case the variance is *fatal at the trial*. (Mayor of Stafford v. Bolton, 1 Bos. & P. 43; Doe v. Miller, 1 B. & A. (4 E. C. L.) 703.) In Virginia, however (as in England since 1834), the *misnomer*, at least in the former case, is no ground for even a plea in abatement, but *upon affidavit* as to what is the right name, it is inserted, and the case proceeds. (V. C. 1873, ch. 167, § 18; V. C. 1887, ch. 159, § 3258.)

Where the corporation is *not a party*, and there being occasion to refer to it, the name is *mis-stated*, the mistake, unless it be a mere error *in the spelling* (the *sound being the same*), is a fatal variance *at the trial*. Thus, *Seagrave* for *Seagrave* (being *idem sonans*) is no variance (Williams v. Ogle, 2 Stra. 899); nor *Whycard* for *Wynyard* (Rex v. Foster, Russ. & Ry. 412); but *Austrialia* for *Australia maria*, in describing the *South Sea Company*, was held to be fatal. (Turvil v. Aynsworth, 1 Stra. 787; S. C. 2 Ld. Raym. 1516; 4 Min. Insts. 574.)

In *grants and contracts*, if there be enough to show clearly what corporation was intended, the description is sufficient, though the words and syllables be varied from: or, as it is sometimes expressed, if the description be erroneous *in sensu et re ipsa*, it is fatal; but if only *in syllabis et verbis*, leaving no reasonable doubt of the *identity*, the variance will not impair the validity of the transaction any more than in the case of a natural per-

son. Thus, if to a corporation founded by the name of *major et burgenses burgi domini regis de Lynne Regis* (mayor and burgesses of the king's borough of Lynne Regis), an obligation be made by the name of *major et burgenses de Lynne Regis* (mayor and burgesses of Lynne Regis), omitting the words "*of the king's borough*," it is sufficiently expressed; for the word *burgesses* is significant of a *borough*, and all boroughs are *king's boroughs*. (Mayor, &c., of Lynne Regis, 10 Co. 125 a.) So a bond payable to the "*President and Managers* of the Culpeper Agricultural and Manufacturing Society" is recoverable by the corporation in its true name of "The Culpeper Agricultural and Manufacturing Society," although it is said it would have been otherwise had the bond been made payable to "The President and Managers of the Culpeper Agricultural and Manufacturing *Bank*." (Culpeper Manufacturing Society v. Digges, 6 Rand. 167. See Mayor, &c. of Lynne Regis, 10 Co. 124 a, 124 b, n. (B.); Pitts v. James, Hob. 124.) If the name be so given as to distinguish it from other corporations, and ascertain its identity, it suffices. (Hagerstown T. P. Co. v. Green, 5 Harr. & Johns. (Md.) 122; Inhabitants, &c. v. Strong, 5 Halst. (N. J.) 323; Berks & Dauphin Co. v. Myers, 6 Serg. & R. (Pa.) 16; 5 Mass. 97, 99; 16 Mass. 141.) Thus, a devise to "*George, Bishop of Norwich*," is good, although the bishop's name be *John*, and to "the mayor, jurats, and *town council*" of the ancient town of Rye, will pass land to the corporation of "the mayor, jurats, and *commonalty*" of Rye. And so to omit the words "and company," in designating the obligee in the official bond of the cashier of a bank, has been held not to vitiate the bond. (Bac. Abr. Corp. (C.) 2; Ayray's Case, 11 Co. 21 a.) And devises to "The City of London," to "The University of Oxford," to "Trinity College, Cambridge," although these be not precisely the corporate names of those several bodies politic, yet sufficiently signify the meaning of the devisor, whose wishes are to be more respected than in the case of grants and contracts. (University of Oxford's Case, 10 Co. 576; Counden v. Clarke, Hob. 32 a.)

For a corporation to seek to avoid its own grant or contract, by reason of a *mis-nomer* of itself, savoring of fraud, and is justly reprehended by Lord Coke as a pernicious novelty, which, "till this generation of late times, was never read in any of our books." (Sir Moyle Finch's Case, 6 Co. 65 a; Mayor, etc., of Lynne Regis, 10 Co. 125 b.)

A corporation may have one name by which to take, grant and contract, and another by which to plead and be impleaded. Thus, it may purchase and contract by

the name of "master, wardens and brothers," and be empowered to sue and be sued by the name of "wardens" alone. (Bac. Abr. Corp. (C.) 1; Coll. of Physicians, 2 Salk 451; S. C. 1 Ed. Raym. 630; *Minot v. Curtis*, 17 Mass. 441.) Nor does there seem to be any reason why a corporation, like a natural person, may not have several names for all purposes, either because the charter shall so provide, or because it is indiscriminately *called and known* by several designations. (Bac. Abr. Corp. (C.) 1, and cases *supra*.)

A corporation, subsequently to its original creation, may receive a new name, or if it exist by prescription, it may be known by diverse names at different periods; but it does not, by a change of name, lose its franchises, debts, or estates, all of which remain, and are recoverable by the body, under its new designation. (Bac. Abr. Corp. (C.) 1; *Luttrel's case*, 4 Co. 876; *Mayor of Scarborough v. Butler*, 3 Lev. 237; *Mayor of Carlisle v. Blamire & al.* 8 East, 487; *Wilson v. Ches. & O. R. R. Co.* 21 Grat. 660-'61.)

3^e. The Place of a Corporation.

"Without a place," says Lord Coke, (*Sutton's Hosp.* 10 Co. 29 b), "no incorporation can be made." The principal purpose of the requirement seems to be to *distinguish the corporation* from others, so that, whilst the *place* ought to be so far designated as to show that the corporation was designed to *have its being* within the limits of the State or country which creates it, it is not needful to assign to it a more particular locality; nor is it requisite that the place stated should be the real place of its intended operation. Thus, the "Prior of the Hospital of St. John of Jerusalem, *in England*,"—the "Hospital of St. Lazarus of Jerusalem, *in England*,"—the "Prior of St. Mary of Mt. Carmel, *in England*,"—the "Chaunters of Mt. Calvary without Aldgate, *London*,"—are all good corporations. (*Sutton's Hospital*, 10 Co. 32 a, 32 b; *Ang. & A. Corp.* (10th ed.) § 103; *Com. Dig. Franchise*, (F. 8).)

How far a corporate body can actually have "a local habitation," is a question which arises in connection with, (1). The imposition of *municipal taxes*; (2). With the capacity to *transact business* in other localities, especially in other States; and (3). With the *right to sue and be sued*, when it depends on residence or citizenship.

W. C.

1^f. Place of a Corporation as to Imposition of Taxes.

Taxes may unquestionably be imposed by a county, town, or other local municipal authority, *upon the property*, real or personal, belonging to a corporation, so

far as the same lies within its limits, and is not by law exempt; and also upon the individual *resident stockholders* in respect to their shares in the capital stock of the company; but it appears the better opinion that such local taxes cannot be imposed upon the *corporation* in respect to its *capital stock*, as if it *were a resident* of that locality, nor upon the non-resident stockholders in respect of their shares, unless it be plainly so provided by statute. The corporation is not properly a *resident* anywhere, and a *share* in it, which is for the most part personal property, in the absence of any law to the contrary, follows the person of its owner, and has its *situs* at his domicile. But for purposes of taxation it may be separated from him *by special law*, which may direct its taxation to be at the place where the property is actually located; and this principle may apply as well to intangible property, like shares in incorporated companies, as to tangible chattels. (*Tappan v. Merchants Bank*, 19 Wal. 499; *Cooley Taxat'n*, 16, 43, 274; *Inhabitants Gr. Barrington v. County Commissioners*, 16 Pick. (Mass.) 572; *Bernis v. Boston*, 14 Allen (Mass.), 366; *Com'th v. Hays*, 8 B. Monr. (Ky.) 1, 2; *City of New Albany v. Meekins*, 56 Am. Dec. 529, *note*; *Cornwall v. Connellsville*, 15 Ind. 150; *Madison v. Whitney*, 21 Ind. 261; *Whitney v. Madison*, 23 Ind. 331; *Howell v. Cassopolis*, 35 Mich. 471.)

The national bank law has thus provided for the separation of the stock in any of those banks from the person of the owner, by enacting that taxes *under State authority* may be imposed on the shares belonging to the holders (although the entire capital of the bank be invested in the bonds of the United States, which cannot be taxed by State authority,—*Van Allen v. The Assessors*, 3 Wal. 573; *Lionberger v. Rouse*, 9 Wal. 473), and also on the real property belonging to the association *at the place where the bank is located* (that is, *within the State* wherein it is situated), and the legislature of each State may determine the manner and place of taxing all the shares of such banks within its limits; *save* that the taxation shall not be at a greater rate than upon other moneyed capital, and that the shares of non-residents of the State shall be taxed in the city or town where the bank is located, and not elsewhere. (15 U. S. Stats. 34; Rev. Stats. U. S. § 5219; *Cooley Taxation*, 394-'5; *Tappan v. Merchants Bank*, 19 Wal. 499 & seq.; *Nat. Bank v. Com'th*, 9 Wal. 353; *Van Allen v. The Assessors*, 3 Wal. 581 & seq.; *Bradley v. The People*, 4 Wal. 462; *Lionberger v. Rouse*, 9 Wal. 474.)

It is not competent, even to a State legislature, to im-

pose a tax upon the *corporate franchise* itself, belonging to a corporation, unless the power to do so be reserved in the charter, or the power be reserved to modify or repeal it, because the charter of a *private corporation* is a *contract*, and to levy a tax on the *franchise* (in contradistinction to the *property*) of the corporation, would impair the obligation of the contract, which the United States Constitution (Art. I., § X., 1.) forbids any State to do. (Ang. & A. Corp. (10th ed.) §§ 470, 477; Rex v. St. Luke's Hospital, 2 Burr. 1053; Rex v. St. Bartholomews, 4 Do. 2435; Rex v. Gardner, Cowp. 79, Staffordshire, &c. v. Canal, 1 T. R. 348 '9; King v. Teignmouth, 12 East. 46; Rex v. Mirfield, 10 East. 219; King v. Hull Dock Co. 5 M. & S. 394; Bank of Watertown v. Assessors, 25 Wend. (N. Y.) 686; Brown v. Prest. Pen. Bank, 8 Mass. 445; Portland Bank v. Aythorp, 12 Mass. 252; Prov. Bank v. Billings, 4 Pet. 514; Dartmouth Coll. v. Woodward, 4 Wheat. 518; Worcester v. West. R. R. Co. 4 Mete. (Mass.) 564; Johns v. Comm'th, 7 Dana (Ky.) 342.)

And corporations created by the United States as agencies to accomplish the constitutional purposes of the Federal government are not to be taxed by the States, for if that were allowed the action of the Federal authority might be paralyzed. (Cooley Taxation, 57 '58; McCulloch v. State of Md. 4 Wheat. 316; Osborn v. Bank of U. States, 9 Wheat. 738; Nat Bank v. Kentucky, 9 Wal. 362; Thompson v. Pacific R. R. Co. Id. 579.) But the restriction does not extend to a tax on the *real or other property* of the bank created by the United States as a financial agent, but not necessary for its functions as such, nor to a tax on any interest in such institution which the *citizens* of a State may *individually* possess (Same cases; Van Allen v. The Assessors, 3 Wal. 573; People v. The Commissioners, 4 Wal. 244; Bradley v. The People, 4 Wal. 459; Nat. Bank v. The Commonwealth, 9 Wal. 353; Lionberger v. Rouse, 9 Wal. 468); and the tax on the shareholders may be collected *of the bank itself*, out of the dividends. (Nat. Bank v. Kentucky, 9 Wal. 362 '3.) There is also a marked distinction between a corporation created by the Federal government for national purposes, and corporations deriving their existence, and exercising their franchises, under authority of State laws, but employed by the national government for certain duties and services. As to the latter, while congress may exempt from any State taxation which will really prevent or impede such services, yet in the absence of legislation by congress, to indicate that such exemption is deemed essential to the govern-

mental services expected from them, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government. And the tax may be either upon the property or business of the corporation; but of course not on any instrumentalities or means of the government in the possession of such corporation. (Nat. Bank v. Comm'th, 9 Wal. 353; Thompson v. Pac. R. R. Co. 9 Wal. 579; West. U. Tel. Co. v. Richmond, 26 Grat. 30 & seq.)

And so, on the other hand, it is not competent to congress to impose a tax on any necessary and direct agency of the States, in the administration of their reserved powers, *e. g.*, upon the *salaries of judges* (Collector v. Day, 1 Wal. 113, 124); although a tax upon banks incorporated by a State, notwithstanding they may be needful agencies of the State governments in respect to their financial system, is held to be constitutional. (Veazie Bank v. Fenno, 8 Wal. 533.) The principle remains, however, and is acknowledged by the supreme court of the United States, that it is as important to leave the rightful powers of taxation unimpaired in the States as to maintain the powers of the Federal government in their integrity. (Ward v. Maryland, 12 Wal. 427 & seq.; Osborne v. Mobile, 16 Wal. 479, 481; R. R. Co. v. Peniston, 18 Wal. 29; Cooley, Taxation, 58.)

Where a State government, in creating a corporation, exempts its property from taxation, no tax can be constitutionally imposed, either upon its personal or real property required for the successful prosecution of its business, nor upon its *franchise*, which also is its *property*; unless indeed, by the charter, or by the general law, the right of amendment or repeal is reserved. But such a restriction upon the State's power of taxation, in general so impolitic, must be clearly and unambiguously set forth in order to prevail. (U. S. Const., Art. I., § x., 1; Cooley, Taxation, 55, 150-152, and notes; Home, &c. v. Rouse, 8 Wal. 438; Wash. Univ. v. Rouse, Id. 440; Wilmington R. R. v. Reid, 13 Wal. 266-'7; Raleigh & Gaston R. R. Co. v. Reid, Id. 270; Tomlinson v. Jessup, 15 Wal. 458-'9; Trask v. Maguire, 18 Wal. 401 & seq., 408; Antoni v. Wright, 22 Grat. 833; Binghamton Bridge, 3 Wal. 75.)

Corporations are included under the word *persons* or *inhabitants*, and therefore, a statute levying a tax on the property of *all inhabitants*, or of *all persons*, will, for the most part, apply to the property of *corporations*, as well as of natural persons. This, however, is a matter of construction, and will be controlled by the *intent*, to be gathered from the context. (Cooley, Taxation, 273;

Louisville, &c. R. R. Co. v. Com'th, 1 Bush, (Ky.) 250; Cherokee, &c. Ins. Co. v. The Justices, 28 Geo. 121. And as all corporations are taxable, unless the power has been *charly* relinquished by the legislature, the method of taxation and the measure of the tax depend on legislative discretion. Hence, while sometimes the tax is on the franchise, it is at others, and more frequently, on the capital, or the capital stock, on the business done, on the dividends or profits, or on the tangible property. If the tangible property is *real* and is treated as real, it is properly to be assessed where it is located; but if *personal*, in the absence of any special provision to the contrary, it is to be assessed to the corporation at the place of its *business office*, that being the legal *situs* of its personality. (Cooley, Taxation, 273, 393; Portland Bank v. Apthorp, 12 Mass. 252; Bank of Penn. v. Com'th, 19 Penn. St. 144; State v. Person, 32 N. J. 134; Pac. R. R. Co. v. Car Co. 53 Mo. 17; Soc. for Savings v. Coite, 6 Wal. 606 & seq.; Provid. Ins. Co. v. Massachusetts, 6 Wal. 625 & seq.; O. & A. R. R. Co. v. Alexandria, 17 Grat. 176.)

2^d. Place of a Corporation, as Respects its Capacity to *Conduct Business Elsewhere*.

A corporation can have no legal actual existence beyond the limits of the sovereignty which created it. Existing only in contemplation, and by force of the law, it can have no absolute and independent being where that law ceases to operate. It must *dwell* in the place of its creation, and *cannot migrate* to another sovereignty. But it does not follow that its existence in its own proper *habitat* may not be recognized in other places. It can do no acts either within or without the State which creates it, except such as are *authorized by its charter*; and those acts must also be done as *the charter directs*. And if the charter, by a just construction of its terms, does not permit the corporation to exercise its powers beyond the limits of the State, all contracts made and acts done in other States are *ultra vires* and void. But if there be in the charter no restriction of locality in the exercise of its faculties, its *residence* in one State no more hinders its contracting in another than it would in the case of a natural person. The only questions are, whether the act or contract be within the *legitimate scope of the corporate functions* of the body politic; and that being resolved affirmatively, whether, secondly, the act, etc., is permitted by the *policy of the law of that country where it takes place*. It is doubtless competent to the State to prohibit any foreign corporation to make contracts or to transact busi-

ness within its limits, but such rigor would be seldom warranted by prudence, and would be wholly opposed to the usual comity which is observed between the countries of the world. By virtue of that comity, every country is presumed to sanction all transactions of foreign persons, natural or artificial, which occur within it, and which it does not expressly and *plainly prohibit*; which is, indeed, no more than recognizing the laws of another sovereignty, as, in general, civilized countries do. And if this principle prevail, as it does, between countries wholly independent of one another, it cannot be less true as between these States, which are united by so many and such intimate ties of business and political association. (*Bank of Augusta v. Earle*, 13 Pet. 519, 588, &c.; *Tombigbee R. R. Co. v. Kneeland*, 4 How. 16; *Lafayette Ins. Co. v. French*, 18 How. 405; *St. Louis v. Ferry Co.*, 11 Wal. 429; *Liv. Ins. Co. v. Massachusetts*, 10 Wal. 566, 573; *Ex parte Schollenburger*, 6 Otto (96 U. S.) 377; *Bank of Marietta v. Pindall*, 2 Rand. 465; *Taylor v. Bank of Alexandria*, 5 Leigh, 475; *Cowardin v. Universal Life Ins. Co.*, 32 Grat. 447; *Silver Lake Bank v. North*, 4 Johns. C. R. (N. Y.) 372.)

The acquisition of lands by foreign corporations, like other transactions, is regulated by this principle. And in Virginia it is believed that there is no other restriction than that which applies to domestic corporations as well, namely: that "No incorporated company shall hold any more real estate than is *proper for the purposes for which it is incorporated*, nor employ its capital, money, or effects, or otherwise engage in transactions or business not proper for those purposes. One company shall not subscribe to the stock of another, unless it be specially allowed by law." (V. C. 1873, ch. 56, §§ 2, 3; V. C. 1887, ch. 46, §§ 1070, 1071; *Banks v. Poiteaux*, 3 Rand. 136.)

Since the local sphere within which a corporation may exercise its functions, and the functions themselves, depend on the terms of the charter, that must always be consulted in order to determine the question of where it may act and what it may do. Thus, if a college be established in a designated town, it has not the power to institute another seminary elsewhere as a branch of itself. (*People v. Trustees of Geneva College*, 5 Wend. (N. Y.) 211.) And as it is in the discretion of every State to allow or prohibit foreign corporations to operate within its jurisdiction, so it may prescribe such conditions as it shall think fit, one of which may be, and sometimes is, that the corporation shall consent to be *sued there*, which consent, indeed, is to be presumed

from its *doing business there*. It becomes, indeed, by thus doing business there, by the consent of the State, express or implied, *quoad hoc*, a corporation *of that State*, so far at least as liability to its citizens is concerned. (Lafayette Ins. Co. v. French, 18 How. 405; Balt. & O. R. R. Co. v. Harris, 12 Wal. 81; Liverpool Ins. Co. v. Mass. 10 Wal. 576; Slaughter's Case, 13 Grat. 767; Balt. & O. R. R. Co. v. Wightman, 29 Grat. 436 '7; Balt. & O. R. R. Co. v. Noell, 32 Grat. 397 '8.) But it is regarded as a citizen of the State *only* for the purpose of *being sued in our courts*, so that a suit against a foreign corporation, thus doing business within the territory of Virginia, is held by the Virginia courts not removable into the circuit court of the United States. (Continental Ins. Co. v. Kasey, 25 Grat. 268; Conn. Mut. Life Ins. Co. v. Duerson, 28 Grat. 630); and yet to all other purposes it continues a foreign corporation, not being competent to change its *residence*, save to the qualified extent above stated (*Ex parte* Schollenberger, 6 Otto (96 U. S.), 377), and, therefore, it may be proceeded against as a *non-resident*, by foreign attachment. (Cowardin v. Universal Life Ins. Co. 32 Grat. 447.) Let it be observed, however, that so far as relates to the removability into the United States circuit court of suits against foreign corporations doing business in Virginia, the doctrine maintained by the court of appeals of Virginia, in Cont. Ins. Co. v. Kasey, 25 Grat. 268, and Conn. Mut. Life Ins. Co. v. Duerson, 28 Grat. 630, is overruled by the supreme court of the United States in B. & O. Railroad Co. v. Koontz, 104 U. S. 512, wherein a judgment of the Virginia court was reversed for that reason. See 4 Min. Insts. 270.

It should be observed that a corporation, although it may have a *quasi habitat* or residence in another State than that which created it, yet *cannot be a citizen* elsewhere, and therefore cannot claim the benefit of that clause of the United States Constitution (Art. IV., § ii.) which declares that "the *citizens of each State* shall be entitled to all privileges and immunities of *citizens* in the several States." (Bank of Augusta v. Earle, 13 Pet. 586; Paul v. Virginia, 8 Wal. 177, 179; Liv. Ins. Co. v. Massachusetts, 10 Wal. 573; Ducat v. Chicago, 10 Wal. 415.)

Two or more States may concur in creating corporations having the same name, composed of the same members, clothed with the same identical capacities and powers, and intended to accomplish one and the same object; *e. g.*, the Chesapeake and Ohio Railroad Company, which is chartered by the States of Virginia and West Virginia; but they are, notwithstanding, as is be-

lied, *distinct corporations*, neither having any existence outside of the State which created it, although each may exercise its faculties and corporate powers within all the States concerned, by consent of the government of those States respectively, and will be liable to actions accordingly. (Green's Brice's *Ultra Vires*, 547 & seq.; Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286; Insur. Co. v. Francis, 11 Wal. 216; Railroad Co. v. Harris, 12 Wal. 65; Railway Co. v. Whitton, 13 Wal. 283-'4; Balt. & O. R. R. Co. v. Gallahue, 12 Grat. 658. But see Phila., Wil. & Balt. Railroad Co. v. Maryland, 10 How. 392; Pierce, Railroads, 19 & seq.)

3^d. Place of Corporations, as Respects their Capacity to Sue and be Sued, when it depends on *Residence or Citizenship*.

For purposes connected with the jurisdiction of the Federal courts (which have cognizance of controversies "*between citizens of different States*," &c. (U. S. Const., Art. III., § ii., 1), a corporation, although properly *not a citizen at all*, yet is deemed a citizen of the *State which created it*, and no averment or proof of the citizenship of *its members* elsewhere to repel the jurisdiction will avail (Louisville, C. & C. R. R. Co. v. Letson, 2 How. 497; Marshall v. Balt. & O. R. R. Co. 16 How. 329; Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 297; Railway Co. v. Whitton, 13 Wal. 583); although prior to 1844 it had been persistently held that, in order to entitle a corporation to sue or be sued in the Federal courts, under the provision in question, *every corporator* must be a citizen of some State other than that of which the other party was a citizen. (Strawbridge v. Curtis, 3 Cr. 267; Bank of U. S. v. Deveaux, 5 Cr. 84; Bank of Vicksburg v. Slocomb, 14 Pet. 60.)

In a State court, if jurisdiction depends on *residence*, it is presumed that, in the absence of statutory rule, the corporation would be considered *to reside* in that county or city wherein is its principal office, or wherein its operations are conducted; or if its operations are not limited, and there is no principal office, then in any county or city in the State. (Ang. & A. Corp. (10th ed.) § 107; 1 Hawks. (N. C.) 422.) But in Virginia we have a statutory rule (V. C. 1873, ch. 165, § 1 (cl. 2), § 2; V. C. 1887, ch. 157, § 3214 (cl. 2), § 3215) which directs that a corporation may be sued in any county or city wherein is its principal office, or wherein its principal officer *resides*, or wherein the cause of action, or part of it, arose.

2^o. The Organization of Corporations.

In order to unfold the doctrine touching the organization

of corporations, we are to advert to, (1), The acceptance of the charter by the corporators ; (2), Proof of acceptance of the charter ; (3), Attributes or incidents of a corporation at common law ; (4), Admission and election of members and officers ; (5), Disfranchisement of members, and amotion of officers ; (6), Subscription for and assessment upon shares in joint-stock companies ;

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1^d. The Acceptance of the Charter by the Corporators.

A majority *in interest* of a duly constituted meeting of the corporators must accept formally, or by implication, the provisions of the charter, which is in the *nature of a contract*. At least there must be such consent signified in the case of *private corporations*, and *perhaps*, also, it may be required in the case of *towns*. (Ang. & A. Corp. (10th ed.) §§ 81 & seq. ; Rex v. V. Chan. Cambridge, 3 Burr. 361 ; King v. Passmore, 3 T. R. 40 ; Rex v. Askew, 4 Burr. 2199 ; Dartm. Coll. v. Woodward, 4 Wheat. 518 ; Grays v. Turnpike Co. 4 Rand. 578 ; Riddle v. Locks, &c. of Mass. 169, 184 ; Ellis v. Marshall, 2 Mass. 269, 276, 277.)

2^d. Proof of Acceptance of Charter.

If the particular charter were *applied for*, its *acceptance* is presumed. And so, if the charter itself declares the corporation to be a *corporate body*, as where it incorporates certain named persons, and *such others as may be associated with them*. (Ang. & A. Corp. (10th ed.) § 83 ; Frost v. Frostburg Coal Co. 24 How. 278.) Hence, in charters granted by the *circuit or corporation court*, upon application, the applicants constitute a corporation as soon as the certified copy is delivered to the secretary of state of the commonwealth, and is lodged in the office of the secretary. (V. C. 1873, ch. 57, § 60 ; V. C. 1887, ch. 47, § 1146.)

Where certain acts preliminary to organization are required,—*e. g.*, notice of the meeting of corporators for the purpose, &c.—these acts must be proved (Grays v. Turnpike Co. 4 Rand. 579 ; Owing v. Speed, 4 Wheat. 420, n.) ; but they may be proved presumptively as well as by direct evidence, as by showing that at the first meeting officers were duly elected, and that thenceforward for twenty years the proceedings of the corporation had been regularly conducted. (Middlesex Husbandmen v. Davis, 3 Mete. (Mass.) 133.) And persons who deal with a company are thereby estopped to object to any irregularity in its organization. (Frost v. Frostburg Coal Co. 24 How. 278.)

In general, the proof of acceptance of an *original charter* should be by the corporate records, and if they exist, by *them alone* ; but it seems not absolutely indispensable to produce the records. The acceptance may be shown by

the corporation having *acted under the charter*. (Grays v. Turnpike Co. 4 Rand. 580; Crump v. U. S. Mining Co. 7 Grat. 352; Russell v. McLellan, 14 Pick. (Mass.) 63; Middlesex Husbandmen v. Davis, 3 Metc. (Mass.) 133; U. S. Bank v. Dandridge & als. 12 Wheat. 64, 71; Rex v. Hughes, 7 B. & Cr. (14 E. C. L.) 708.)

In case of an *amended charter*, the acceptance may be shown by any acts of recognition by the incorporators lawfully assembled, or by their lawful agent for that purpose; *e. g.*, the *directors*, &c. (Dartm. Coll. v. Woodward, 4 Wheat. 688.) And so necessary is the acceptance of an amended or modified charter, that even under the power reserved to repeal, alter or modify the charter of a private corporation, whilst the legislature may *repeal* the charter at its pleasure, it cannot modify it without the consent of the corporation; although if it refuses to consent, it must cease its operations as a corporate body. (Yeaton v. Bank of Old Dominion, 21 Grat. 598-'9.)

Acceptance of an original charter cannot be *partial*, nor for a *limited time*, nor *conditional*; but as to an amended charter, *it is said* to be otherwise. (Ang. & A. Corp. (10th ed.) § 85; Rex v. Passmore, 3 T. R. 240; Rex v. Amery, 1 T. R. 589; Rex v. Cambridge, 3 Burr. 1656; Rex v. Basey, 4 M. & S. 255.)

Individual incorporators are bound in the acceptance of a charter, original or amended, by the act of the majority, where there is no *fraud*. (Currie v. Mut. Ins. Co., 1 H. & M. 315.)

3^d. Attributes or Incidents of a Corporation at Common Law.

These attributes are tacitly, and by implication, annexed to every corporation as soon as created, without any express grant, although they may be more or less circumscribed by the charter itself, or by the general law. At present it will suffice merely to *name them*; they will be discussed more at large in speaking of the *powers of corporations*. (1 Bl. Com. 475-'6; Ang. & A. Corp. (10th ed.) §§ 110 & seq.; V. C. 1873, ch. 56, § 1; V. C. 1887, ch. 46, § 1068; *Post*, pp. 587 & seq.)

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1^e. To have Perpetual Succession.

Not that all corporations *actually have* perpetual succession, but all possess the *capacity to have it*, if the authority which creates them shall think fit to bestow it. (1 Bl. Com. 475.)

2^e. To have a Common Seal, and Change the Same at Pleasure.

The common seal authenticates the expression of the aggregate corporate will, and was for many ages deemed the *only mode* of doing so. This doctrine, however, is

much broken in upon in England, and in the United States is wholly discarded, corporations being allowed to express the corporate will, not only by the *common seal*, which, by statute in Virginia may be an impression on paper or parchment alone as well as on wax, etc. (V. C. 1887, ch. 133, § 2841), but also by a *vote of a majority of the corporators* at a lawful meeting, and entered upon their corporate records: by a *vote of a majority of directors*, entered on the directors' minutes: by *agents* duly appointed; and by *accepting the benefit* of the contract, or otherwise ratifying it. (1 Bl. Com. 475 & n. 55; V. C. 1873, ch. 56, § 1; V. C. 1887, ch. 46, § 1068; Dunn v. Rector, 14 Johns. 118; Bank of Columbia v. Patterson, 7 Cr. 305; Legrand v. Sidney, 5 Munf. 324; Fleckner v. U. S. Bank, 8 Wheat. 338; Burr v. McDonald, 3 Grat. 215; Eureka Co. v. Bailey Co. 11 Wal. 491; Andover, &c. Turnpike Corp'n v. Gould, 6 Mass. 40.)

3°. Power to Contract and be Contracted with.

The only restriction is that the subject of the contract shall not be beyond the scope of the purpose for which the corporation was created, (*ultra vires*, as it is called), and shall not be prohibited, either by the charter or by general law. (1 Bl. Com. 475, 484; Bac. Abr. Corp. (C.) 23; Ang. & A. Corp. (10th ed.) §§ 256 & seq., 265 & seq., 275.)

4°. Power to Take, Hold, Transmit in Succession, and to Alienate Property, and to do all Similar Acts just as a Natural Person may.

But by the statutes of *mortmain* in England, it is provided, that if any corporation purchase *lands* without a *license from the Crown*, they shall be forfeited. And in Virginia it is enacted that no corporation shall hold any more *lands* than are allowed by charter, or if the charter be silent, than are required by the *objects of the corporation*; but it is not said what shall be the consequence of violating the prohibition. It is presumed, however, that the lands are *forfeited to the commonwealth*. (1 Bl. Com. 475 & n. (4); V. C. 1873, ch. 56, §§ 2, 3; V. C. 1887, ch. 46, §§ 1070, 1071; 2 Min. Insts. 585.) But see Banks v. Poiteaux, 3 Rand. 141; 1 Com. Dig. 13, 4.

5°. Power to Make By-laws for the Government of the Corporation.

Such by-laws must be consistent with the laws of the land, and of course *conformable to the charter*. (1 Bl. Com. 475; V. C. 1873, ch. 56, § 1; V. C. 1887, ch. 46, § 1068.)

6°. Power to Sue and to be Sued.

A corporation may sue for every possible cause of action or suit which *it can have*, and in like manner may be

sued for every one which *can exist against it*. (1 Bl. Com. 475; Stor. Confl. L. § 565.)

7^e. Power to Remove Members and Officers.

This power is limited, in respect to removal of *members*, to those corporations whose membership supposes *no property interest* to be concerned. (2 Kent's Com. 224; Ang. & A. Corp. (10th ed.) §§ 110, 410, 423 & seq.)

4^d. Admission and Election of Members and Officers; w. c.

1^o. Admission of Members.

The mode of admitting members is generally determined by the charter. If that be silent, a distinction is to be noted between corporations for *business purposes* on one side, and other corporations, religious, scientific, political, or social, on the other. In the former, *no vote of admission* is generally needful. Every one who owns stock, whether by original subscription, or by conveyance or transfer, is entitled to the rights of membership; but the transfer must be attested by the book of the company in which the transfers are recorded. In the latter class of corporations, in the absence of any directions in the charter, members are admitted by *vote of the company*, taken like any other vote. (Ang. & A. Corp. (10th ed.) § 113.)

2^o. Election of Officers.

The mode of electing officers is as the charter prescribes (*e. g.*, by a vote of the corporation in lawful meeting assembled, by the board of directors, or by a select committee); or if the charter is silent, then by a *vote of the company*, taken like any other vote; or the corporation may, *by a by-law*, devolve the election of officers, or any of them, upon a select body, if not inconsistent with the charter. (Ang. & A. Corp. (10th ed.) §§ 115 & seq.)

No one, in general, can be elected to a corporate office *in reversion*, and it is therefore essential that there shall be a *vacancy*. Hence, where an officer is illegally removed, and another elected in his place, upon the restoration of the former by writ of *mandamus*, the latter's election is *ipso facto* vacated. (King v. Mayor of Colchester, 2 T. R. 280; Colt v. Bishop of Coventry, Hob. 150; The King v. Smith, 2 M. & S. 407; Burr's Ex'ors v. McDonald, 3 Grat. 215.)

If a day be appointed by the charter for the election of officers, or a certain hour of the day, the election may notwithstanding be validly made *after that day*, or after that hour, at a reasonable time, the designation of the time being merely *directory*. Nor need the person elected be then present, if near enough to enter upon the duties of the office. (Foot v. Mayor of Truro, 1 Stra. 625; S. C. 2 Stra. 697; Rex v. Poole, 7 Mod. 195; Rex v. Courtenay, 9 East. 261; Atto. Gen. v. Scott, 1 Ves. Sr.

415; *People v. Runkle*, 9 Johns. 147; *King v. Mayor, &c. of Norwich*, 1 B. & Ad. (20 E. C. L.) 310.)

If the charter prescribes no form or mode of election, every candidate must be proposed and elected *singly*, and not all by one vote; for in the latter method, each elector, in order to get in some particular person, may compromise his opinion as to the others, and thus persons may be introduced who are not the choice of a majority. (*Rex v. Monday*, Cowp. 539. But see *Queen v. Brightwell*, 10 Ad. & El. (37 E. C. L.) 171.)

When the meeting to elect officers is properly constituted, whoever has a majority of all *the votes cast*, whether it be a majority of *those present or not*, is elected, supposing there be nothing in the charter to the contrary. If the members neglect to vote, it is their own default, and does not invalidate the act of the others. And so it is, although those who do not vote protest against an election at that time altogether. So also, if a majority of the electors bestow their votes upon one whom *they know* to be unqualified, the votes given after they are made acquainted with the disqualification are *thrown away*, and the minority who vote for a qualified person will elect their man. (*Rex v. Foxcroft*, 2 Burr. 1020, 21; S. C. 1 W. Bl. 229; *Claridge v. Evelyn & als.*, 5 B. & Ald. (7 E. C. L.) 81, 86; *King v. Parry*, 14 East. 561; *King v. Hawkins*, 10 East. 211; *King v. Bridge*, 1 M. & S. 76.)

To vote *by proxy* is not a right generally existing at common law, as incident to *all corporations*. It may perhaps belong of right to *shareholders* in joint-stock companies; but in corporations where no property attaches to members, and in all cases where a *personal trust* is to be exercised, it exists only where given by the charter, or *possibly* by a by-law of the company. (2 Kent's Com. 294, n.; *Atto. Gen. v. Scott*, 1 Ves. Sr. 417; *Phillips v. Wickham*, 1 Pai. (N. Y.) 590.)

The person to vote upon shares is generally the party named on the *company's books* as the shareholder. Hence, it is said the mere *tenant for years* of the shares cannot have the privilege; and hence, too, *trustees* who are charged with the *management of the subject* possess it; as does the *pledger* of stock, in case of the hypothecation, until it is actually transferred to the pledgee. (Ang. & A. Corp. (10th ed.) §§ 131, 132.)

To choose *too many* persons as officers vitiates the whole election; whilst an election of *too few* is good as far as it goes, and requires only to be supplemented as to the additional persons. (Ang. & A. Corp. (10th ed.) § 135.)

The reception of illegal votes does not necessarily avoid

an election, but it must appear that to exclude the illegal votes would have produced a different result. (*Ex parte*, Murphy, 7 Cow. (N. Y.) 153; *In re* Chenango Mut. Ins. Co., 19 Wend. (N. Y.) 635.) On the other hand, where votes are *erroneously rejected*, the only remedy is to set the election aside, not to regard them as received, and given to the contestant. (Ang. & A. Corp. (10th ed.) § 136.)

Where the charter pronounces an irregular election *void*, no formality or proceeding is required to annul it; but in the absence of such a provision in the charter, an irregular election is *not void*, but voidable only, remaining in force until it is annulled by *judicial sentence*. Hence, where a majority of the votes are given to an ineligible candidate, of whose disqualification, however, no *express notice* is given to the voters, a party having the minority of the votes is not duly elected, but if declared so, and he accepts the office, he can only be removed by *judicial proceedings*. (Ang. & A. Corp. (10th ed.) § 137.)

Any *de facto* officer of a corporation, claiming to have authority, and allowed for a long time to act as such, must be presumed rightfully in office, without further proof, and his acts are, in general, binding upon the body accordingly. (Bank of U. States v. Dandridge, 12 Wheat. 79; Burr v. McDonald, 3 Grat. 215.) The same principle applies *a fortiori* to public officers *de facto* coming in by color of title as the public peace and order require. While one holds an office thus *de facto* by color of title, all his official acts are, as to third persons, valid. (Bac. Abr. Officers, &c. (B.), 1; Vin. Abr. Officers (G. 4); The People v. Collins, 7 Johns. (N. Y.) 552, 554; McInstry v. Tannar, 9 Johns. 135-'6; Fowler v. Bebee, 9 Mass. 234-'5; Com'th v. Fowles, 10 Mass. 301; Nason v. Dillingham, 15 Mass. 171; Buckman v. Ruggles, 15 Mass. 182-'3; Monteith v. Com'th, 15 Grat. 180 & seq.)

There seems to be no *legal reason* forbidding the inspector of a corporate election to be voted for at it, his office, it is said, being purely *ministerial*, and *not judicial*; yet it is surely undesirable on *moral grounds* that one appointed to secure a fair expression of opinion, and to certify it, should himself be one of the parties interested. (Ang. & A. Corp. (10th ed.) § 141.)

Officers elected for a certain term hold over, it seems by the common law, until their successors are chosen and qualified, independently of any provision to that effect in the charter, although such provisions are generally inserted. (2 Kent's Com. 238; Ang. & A. Corp. (10th ed.) §§ 142, 143.)

5^d. Disfranchisement of Members, and Amotion of Officers.

A distinction must be noticed between *disfranchisement* and *amotion*. Amotion relates to *officers* alone; disfranchisement to *corporators* or *members* of the corporation. Amotion is the removal of a corporation officer from his office, but it leaves him still a member of the corporation. Disfranchisement is the taking away from a corporator of the *franchise* or right of being any longer a *member* of the corporate body. (Ang. & A. Corp. (10th ed.) § 408; 1 Dill. Mun. Corp. § 177.)

W. C.

1°. Disfranchisement of Members.

In case of corporations owning property *divided into shares*, no shareholder is liable *to be expelled* for any cause whatsoever, unless it be specially so provided in the charter; but as by purchase of stock he becomes a member, so by transferring it he ceases to be such, without the concurrence of the corporation in either case, save to record the transfer of the shares. (Davis v. Bank of England, 2 Bingh. (9 E. C. L.) 393; Ang. & A. Corp. (10th ed.) §§ 410 & seq.)

But in case of corporations of a different character—*e. g.*, municipal, religious, benevolent, scientific, etc.—where there is no specific share of property vested in each corporator, disfranchisement may take place certainly in pursuance of the express terms of the charter, and *perhaps* as incident to the very nature of the corporation, and as being the consequence of a breach of the conditions tacitly annexed to every such franchise, for every infamous offence of which the corporator shall be *convicted in due course of law*, and for every act *contrary to his duty* as a corporator. (Rex v. Richardson, 1 Burr. 538-39; Lord Bruce's Case, 2 Stra. 819; Com'th v. St. Pat. Soc. 2 Binn. (Pa.) 448, 441; Rex v. Andover, 3 Salk. 229; Rex v. London, 2 Lev. 201; Rex v. Guildford, 1 Lev. 162; Rex v. Rogers, 2 Ld. Raym. 777; Com'th v. Guardians of Poor, 6 Serg. & R. (Pa.) 469.) As to *municipal* corporations, however, it has been justly remarked by an authoritative writer upon the subject, that English cases touching amotion and disfranchisement ought to be followed in our courts with much caution, in consequence of the material differences in the distinctive characteristics of such corporations in England and with us. Here the inhabitants of the municipality are the corporators, and certain of them (usually the adult male residents) are the electors of all or most of the important officers of the corporation, including its legislative functionaries. It would seem, therefore, that the English doctrine of *disfranchisement* of a corporator has no application to our municipal corporations, whether the corporator be con-

sidered as an "inhabitant" or as a "voter." The power thus to disfranchise is not known to have been ever expressly conferred upon the governing body of a municipality, and it is believed that it can in no case be exercised as an implied or incidental right. (1 Dill. Mun. Corp. §§ 177, 178.)

It is a dictate of natural justice that *no one shall be condemned, unheard*, "not founded in book-learning," as a great jurist has observed, "but engraved upon the heart" (Ld. Camden in Shipley's Case, 5 Campb. Lives of Chan'rs, 289; Acts xxv. 16; John vii. 51), and hence, no proceeding can be had until he has been *duly notified to appear*. He is not disfranchised *ipso facto*, upon the occurrence of a delinquency, but must be regularly convicted thereof, after having a reasonable opportunity to defend himself. (Baggs' Case, 11 Co. 99 a; Rex v. Richardson, 1 Burr. 540; Rex v. Liverpool, 2 Burr. 731; Innes v. Wylie, 1 Carr. & Kirw. (47 E. C. L.) 257; Rex v. Lynne Regis, 1 Dougl. 174; Rex v. Faversham. 8 T. R. 256; Harman v. Tappenden, 1 East. 562; Com'th v. Penn. Ben. Instit. 2 Serg. & R. 141.) This principle is much insisted upon, and never relaxed while rights are in question. Summary as are the proceedings against an attorney at law charged with impropriety of conduct, yet before a judgment disbaring him can be rendered, he should have, says the supreme court of the United States, "*notice of the grounds of the complaint against him, and ample opportunity of explanation and defence*." This is a rule of *natural justice*, and should be equally followed when proceedings are taken to deprive him of his right to *practice his profession*, as when they are taken to reach his real or personal property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases, undoubtedly, of such gross and outrageous conduct in open court, on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he *should be heard before he is condemned*. The principle that there must be a citation before hearing, and hearing, or opportunity of being *heard, before judgment*, is essential to the security of all private rights. Without its observance *no one would be safe from oppression*, wherever power may be lodged." (*Ex parte Robinson*, 20 Wal. 512; *Bradley v. Fisher*, 13 Wal. 354; *Ex parte Bradley*, 7 Wal. 375; *Ex parte Garland*, 4 Wal. 378.)

2°. Amotion of Officers of Corporations.

The power to remove officers, unless restrained by the charter, is, from the necessity of the case, as much inci-

dent to a corporation as the power of making by-laws. (Ld. Bruce's Case, 2 Stra. 819; Rex v. Richardson, 1 Burr. 539; Rex v. Lynne Regis, 1 Dougl. 149.) If the officer be a *ministerial one*, holding *during pleasure*, he may, in general, be removed without notice or trial, and is, in fact, removed by the appointment of a successor. But if he holds *during good behavior*, or for a *fixed term*, he can only be removed after summons, and after having had license and opportunity to answer for himself. (1 Dill. Mun. Corp. §§ 192 & seq.; Warren's Case, 3 Cro. (Jac.) 540; Middleton's Case, 3 Dy. 332 b, n. (28); Rex v. Thame, 1 Stra. 115; Ld. Bruce's Case, 2 Stra. 819; Rex v. Richardson, 1 Burr. 539; King v. Lynne Regis, 1 Dougl. 149. See Burr v. McDonald, 3 Grat. 106.)

The causes for which an officer *may be removed* are stated in the case just cited, and Ang. & A. Corp. (10th ed.) §§ 425, 426. See also Regina v. Truebody, 2 Ld Raym. 1275; King v. Lynne Regis, 1 Dougl. 158; King v. Mayor, &c. of Portsmouth, 3 B. & Cr. (10 E. C. L.) 152; Regina v. Bailiffs of Ipswich, 2 Ld. Raym. 1233, 1237; Rex v. Mayor, &c. of York, Id. 1566; Rex v. Chalke, 1 Ld. Raym. 226; Rex v. Corp'n Wells, 4 Burr. 2000; Rex v. Mayor of Andover, 3 Salk. 229; Rex v. Taylor, 3 Salk. 231.

The causes for which he *may not be removed* are illustrated in Symmer's Case, Cowp. 502; King v. Williams, 2 M. & S. 144; Rex v. Mayor, &c. of Leicester, 4 Burr. 2087, 2003; Rex v. Chalke, 1 Ld. Raym. 226; Rex v. Mayor, &c. of Ipswich, 2 Do. 1238; Rex v. Taylor, 3 Salk. 231.

As to the resignation of a corporate officer, which may be either *express or implied*, see Ang. & A. Corp. (10th ed.) §§ 433, 434.

6^d. Subscription for, and Assessment upon, Shares in Joint-Stock Companies.

A subscription for shares in a joint-stock corporation, *is a contract*, for which in a company already existing, the consideration to the subscriber is the interest he acquires in the franchises, and to the company, the money paid, or liabilities assumed by the shareholder. In a corporation *not yet organized*, the consideration to each subscriber is the mutual obligation of the other subscribers, whereby a contract results amongst the individuals until the corporation is organized, and then, *it is said*, with the corporation; but as to the latter proposition, *quære!* The authorities, however, seem to be plenary if not conclusive, in favor of the proposition that the subscription enures to the benefit of the corporation thereafter created. (Cross v. Pinckneyville Mill Co. 17 Ill. 58; Griswold v. Peoria Uni-

versity (26 Ill. 41), 79 Am. Dec. 362; Anderson v. Newcastle & R. R. Co. (12 Ind. 376), 74 Am. Dec. 218.) But where the subscription is made prior to the organization of the corporation, in order to charge the subscriber it must be shown that the organization was made strictly in pursuance of the charter, or of the scheme set forth in the paper containing the subscription. (Taggart v. West. Md. R. R. Co. (24 Md. 563), 89 Am. Dec. 768-'9; Maltby v. N. West Va. R. R. Co. 16 Md. 444; Plank R. Co. v. Hoffman, 9 Md. 568.) The capital subscribed for is, with us, usually payable in instalments, and, as each instalment may be separately recovered when it falls due, the statute of limitations attaches to each one from that time. (Ang. & A. Corp. (10th ed.) § 517; Balt. Turnpike Co. v. Barnes, 6 Harris & J. (Md.) 57; Corning v. McCullough, 1 Comst. (N. Y.) 47.)

The doctrine that the statute of limitations in general begins to run from the time when each assessment is made, or rather from the time when it is payable, is supposed to follow necessarily from the language of the statute itself, which prescribes that the action shall be brought within the designated number of years "next after the right to bring the same shall have first accrued (V. C. 1873, ch. 146, § 8; V. C. 1887, ch. 139, § 2920), and from the uniform rulings of the courts, both English and American, upon the subject. (2 Chit. Cont. (11th ed.) 1229.)

Thus, upon a contract to pay money at a *future time*, or upon the happening of a *certain event*, the time is to be reckoned in the former case from the arrival of the period specified, and in the latter from the occurrence of the event. (Sheetford v. Borough, Godb. 437; Webb v. Martin, 1 Lev. 48; Wittersheim v. Lady Carlisle, 1 H. Bl. 631; Topham v. Braddick, 1 Taunt. 512; Fenton v. Emblers, 1 W. Bl. 354; Wheatley v. Williams, 1 M. & W. 540-'41; Irving v. Veitch, 3 M. & W. 108; Fryer v. Roe, 12 C. B. (74 E. C. L.) 437; Hemp v. Garland, 4 Ad. & El. N. S. (45 E. C. L.) 519; Whitehead v. Lord, 7 Exch. 691; Little v. Blunt, 9 Pick. (Mass.) 491; Codman v. Rogers, 10 Pick. 119; Lamb v. Clarke, 5 Pick. 193; Rodman v. Hedden, 10 Wend. (N. Y.) 489.) And so, upon a contract to do a collateral thing, the statute runs from the time of the breach of the contract. (Short v. McCarthy, 3 B. & Ald. (5 E. C. L.) 626; Whitehead v. Howard, 2 Bro. & B. (6 E. C. L.) 372; Howell v. Young, 5 B. & Cr. (11 E. C. L.) 259; McAlexander v. Montgomery, 4 Leigh, 61.) Even where, by means of a fraud practiced by the defendant, the plaintiff did not *discover* the cause of action until after the period of limitation is past, the general and prevailing rule in the United States is said to be, that the plea of the

statute is thereby repelled (2 Chit. Cont. (11th ed.) 1235, n. (l.)) ; although in Virginia, North Carolina, New York, and some other States, the non-discovery of the fraud will postpone the running of the statute *in equity alone*, and not in a court of law. (Rice v. White, 4 Leigh, 479 & seq.; Callis v. Waddy, 2 Mumf. 511-12; Hamilton v. Shepherd, 2 Murph. (N. C.) 125; Troup v. Smith, 20 Johns. (N. Y.) 23; Leonard v. Pitney, 5 Wend. (N. Y.) 30; Allen v. Miller, 17 Wend. 202.)

Supposing an unreasonably long time to elapse after subscription before an assessment appears *actually* to have been made, it may perhaps be *presumed* that one had been made at the latest reasonable time, and then the statute would probably run *from that time*. But doubtless, such a presumption, if it can exist at all, may be repelled by any circumstances which satisfy the mind that in the particular case it is ill-founded. (Topham v. Braddick, 1 Taunt 576-7.) It has been held, however, that as between the *corporation and a shareholder*, by analogy to the statute of limitations, where the enterprise has not been prosecuted according to the requirements of the act of incorporation, and no calls made within six years from the date of subscription, a presumption of abandonment of the undertaking arose in favor of the shareholder, and that the lapse of time prescribed by the statute (say with us, five years), was a bar to the remedy by call, and to a suit to recover the instalments called for. (Thomps. Stockholders, § 291; McCully v. Pittsburg, &c. R. R. Co. 32 Penn. St. 25; Pittsburg, &c. R. R. Co. v. Byars, 32 Penn. St. 22; Pittsburg, &c. R. R. Co. v. Graham, 36 Penn. St. 77.)

In respect to unpaid balances of subscriptions of stock, due from the shareholders, it would seem to be the better and more reasonable doctrine, that the statute of limitations begins to run, not only from the time when, in pursuance of the calls, the several instalments are due and payable, but also from the time of the notorious insolvency of the company, and its continued cessation of business (Thompson Stockholders, §§ 291, 294; Payne v. Bulard, 23 Miss. 88, (55 Am. Dec. 74); Curry v. Woodward, 53 Ala. 376); because upon such notorious insolvency, proved in any satisfactory manner, as by the making of an assignment, and the continued cessation of business, the creditors—at least the judgment-creditors—may proceed in equity to subject the assets of the company, and amongst the rest, the balances of their subscriptions due from the respective shareholders, so that from that time the cause of suit arises. (Ogilvie v. Knox. Ins. Co. 22 How. 380; Hatch v. Dana, 11 Otto (101 U. S.), 205, 210, 211, 214; Terry v. Tubman, 2 Otto (92 U. S.), 156; Terry

v. Anderson, 5 Otto (95 U. S.), 634-5; Burke v. Smith, 16 Wal. 400, 401; Sanger v. Upton, 1 Otto (91 U. S.), 61, 62-63; Reynolds v. Douglass, 12 Pet. 502; Scovill v. Thayer, 15 Otto (105 U. S.), 155.)

On the other hand, the principle insisted on above, that in case of notorious insolvency of a corporation, the statute of limitations runs in favor of the shareholders, as to unpaid subscriptions from that time encounters a formidable array of adverse judicial *dicta* and decisions, chiefly upon the ground that the capital stock of a corporation is deemed a *trust fund* for the payment of its debts, and that the shareholders are virtually the *trustees* of the fund, and, as trusts fall exclusively within the jurisdiction of equity, the presumption from lapse of time, of satisfaction, payment, or waiver does not apply. (Hightower v. Thornton (8 Georgia, 486), 52 Am. Dec. 424; Reid v. Etonton Man'g Co., 30 Ga. 103; 2 Perry Trusts (4th ed.) § 863.) Hence, in Glenn v. Williams, 60 Md. 93, it was held that the statute of limitations did not begin to run until a court of equity, dealing with the assets of the corporation, makes an assessment upon the shareholders; and the same principle is affirmed in Glenn v. Semple, supreme court of Alabama, Dec. 1885 (Va. Law Jour., April, 1886, p. 247, &c.), in Hawkins v. Glenn, 131 U. S. 330 & seq.; and in Glenn v. Liggett, 135 U. S. 542-3.

In Virginia some provision by statute exists designed to regulate corporate subscriptions, at least where the charter is obtained from the legislature, and before the stock is subscribed; for in the case of charters granted by the circuit court, the subscriptions needful to organize the association are contemplated as made before the charter is applied for, the registry thereof with the secretary of the commonwealth consummating the organization. (V. C. 1873, ch. 57, §§ 59, 60; V. C. 1887, ch. 47, §§ 1145, 1146.) Sometimes legislative charters declare certain persons a corporation for certain purposes, but where there is no provision to the contrary in the charter, the general law directs that the commissioners named in the act of incorporation to receive subscriptions shall give thirty days' notice of the times and places for opening the books of subscription, and shall keep them open for ten days, and longer if need be. The shares are to be \$100 each, payable, in case of a *bank of circulation*, \$10 per share at the time of subscribing, \$25 immediately after the election of the first board of directors, \$25 thirty days thereafter, and of the remaining \$40, \$20 in three, and \$20 in six months after such election. In the case of any other corporation, \$2 per share is to be paid at the time of subscribing, and the residue as may be required by the president and direc-

tors. The sums payable at the time of subscribing are paid to the commissioners. The commissioners, at the place first named in the charter, as soon as sufficient stock is subscribed, are to give notice thereof in a newspaper for not less than two weeks, and to call a general meeting of the subscribers at a certain time and place, not less than fourteen nor more than thirty days from the first day of such publication. The subscribers, and their personal representatives and assigns, shall *stand incorporated* from the time of such meeting, unless the meeting itself determine otherwise. (V. C. 1873, ch. 57, §§ 1 to 6; V. C. 1887, ch. 47, §§ 1106 to 1111.) And in case of charters granted by the circuit courts, the company *stands incorporated* as soon as the copy certified by the circuit court clerk is *lodged with the secretary* of the commonwealth to be recorded. (V. C. 1873, ch. 57, § 60; V. C. 1887, ch. 47, § 1146.)

The subscription being *a contract*, it cannot be cancelled without the consent of the other party or parties thereto, unless it be provided in the charter. (Ang. & A. Corp. (10th ed.) § 523; Kidwelly Can. Co. v. Raby, 2 Price, 93.) And where at the time of the subscription there is not only no company organized, but *no charter*, it seems that the corporation subsequently created can have no privity with the subscribers, and can maintain no action on such subscription for *want of mutuality*. (But see Griffin v. Macaulay, 7 Grat. 476; Ang. & A. Corp. (10th ed.), §§ 523, 524; Chester Glass Co. v. Dewey, 16 Mass. 94.) The suit should be on the part of the individual subscribers, to whom, expressly or impliedly, the promise was in law made. And as the subscription alone, without mutuality, does not create a binding obligation, so also, if the charter prescribe, or if a general statute prescribe (as in Virginia we have seen that it does), certain payments to be made at the time of subscribing, such payment, it is said, is a condition precedent, and indispensable in order to make the subscription valid, and so in case of any other condition precedent. (Thames Tunnel Co. v. Sheldon, 6 B. & Cr. (13 E. C. L.) 341; Ang. & A. Corp. (10th ed.) § 527; Union T. P. Co. v. Jenkins, 1 Cai. Cas. 86; Highland T. P. Co. v. McKean, 11 Johns. (N. Y.) 8; Hibernia T. P. Co. v. Henderson, 8 S. & R. (Pa.) 219; S. C. 11 Am. Dec. 593; Leighty v. Prest. of S. & W. T. Co., 14 S. & R. 434.)

But the student must observe that this last doctrine, namely, that the payment of the money required by the statute to be paid to the commissioners at the time of subscribing, is a *condition precedent* without which the subscription is invalid, and no action can be maintained upon

it by the company against the subscriber, is not a little contested. Some authorities hold that the provision is not in the interest of the corporation, but with a view to *protect the public* against fictitious and collusive subscriptions made in a "pestilent spirit of speculation," or in attempts for selfish ends, to control the organization of the body. (*Hibernia T. P. Co. v. Henderson* (8 S. & R. (Pa.) 219) 11 Am. Dec. 593; *Leighty v. Prest. of S. & W. T. Co.* 14 S. & R. 1434; *Union T. P. Co. v. Jenkins*, 1 Caine's Cas. 86; *Highland T. P. Co. v. McKean*, 11 Johns. (N. Y.) 8); whilst others insist that the provision is designed exclusively *for the benefit of the corporation*, which may, therefore, waive it at pleasure and hold the subscriber liable for that payment and for all subsequent assessments, in consideration of the prospective advantages which may ensue from his membership of the corporation. (*Minn. & St. Louis R. W. Co. v. Bassett* (20 Minn. 245), 18 Am. Rep. 368; *Piscatagua Ferry Co. v. Jones*, 39 N. H. 481; *Smith v. Plank-road Co.* 30 Ala. 630; *McRea v. Hussell*, 62 Ind. (N. C.) 224; *Blair v. Rutherford*, 31 Tex. 465.) And this conclusion is fortified by the consideration that the subscriber is *himself in default* for not paying, and cannot take advantage of his own wrong to controvert the demand of the corporation. (*Wright v. Shelby R. R. Co.* (16 B. Monr. (Ky.) 463) Am. Dec. 525; *Canal Bank v. Holland*, 5 La. An. 363; *Vicksburg R. R. v. McKean*, 12 Id. 658.)

The last named view seems to have been adopted in Virginia, in *Stuart v. Valley R. R. Co.* 32 Grat. 166, 167, but without referring to any authorities. The writer ventures to say with diffidence, that had not our supreme court decided thus, it would have appeared to him that the doctrine first stated, as set down in the case above cited, of *Hibernia T. P. Co. v. Henderson*, is the one most consonant with reason, sound policy and the probable intent of the legislature, and is to be preferred.

It seems to be admitted that if the subscriber is also one of the commissioners who is to receive the money, the non-payment *to himself* does not invalidate the subscription. (*Ryder v. A. & S. R. R. Co.* 13 Ill. 521; *Highland T. P. Co. v. McKean*, 11 Johns. 18; *Grayble v. York & G. T. P. Co.* 14 S. & R. 269.) And also, even though the subscription were originally void because of the failure to make the payment, yet if the subscriber subsequently acts as a corporator he is *estopped* to deny the validity of his subscription. (*Clark v. Monongahela N. Co.* 10 Watts (Pa.), 364; *Erie & W. P. R. R. Co. v. Brown*, 25 Pa. St. 156.)

It follows, also, from the subscription being a *contract*,

that a fraud practiced by the *other party* thereto, or at his instance, in order to obtain it, renders it *voidable* by the subscribers. (Centre & K. Turnpike Co. v. McConehy, 16 Serg. & R. (Penn.) 142.)

There seems to be no reason that the personal representative of a subscriber should not be bound on his contract of subscription as well as on any other contract; and the case of Weald of Kent Can. Co. v. Robinson, 5 Taunt. 801, sometimes vouched to prove the contrary, is misconceived. Nor can there be any reasonable doubt that the original subscriber is, at common law, liable for all the instalments, agreeably to his contract, implied from his accepting and holding the certificate of stock, even though it be not express, and that, notwithstanding he may have assigned his stock before the call is made, or the instalment otherwise becomes due, unless the company accept the assignee *in lieu* of the subscriber; and the case sometimes cited to the contrary (Huddersfield Can. Co. v. Buckley, 7 T. R. 36) was decided upon the special provisions of the charter. (Brigham v. Mead, 10 Allen, (Mass.) 245; Buf. City R. R. Co. v. Douglass, 14 N. Y. 336; Seymour v. Sturges, 26 N. Y. 134; Upton v. Tribilcock, 1 Otto (91 U. S.), 47; Webster v. Upton, 1 Otto (91 U. S.), 66; Sanger v. Upton, 1 Otto (91 U. S.), 60, 61; Hatch v. Dana, 11 Wal. 210.) And so where an assignee of the stock has come into privity with the company, by having stock transferred to him on the company's books, a promise to pay the remaining instalments is as much implied against him as it was against his assignor, and he is liable accordingly. (Ang. & A. Corp. (10th ed.) § 534; Bond v. Susquehanna Bridge, 6 Har. & J. (Md.) 128; Hall v. U. S. Ins. Co. 6 Gill (Md.), 484; Webster v. Upton, 1 Otto (91 U. S.), 69.) At all events, in Virginia, by statute, the assignee and assignor are each liable for any instalment already accrued, or thereafter to accrue; and that even though the company consent to the transfer, although the company might doubtless, by an unambiguous manifestation of an intent to exonerate the original subscriber, discharge him, so far as the company itself is concerned, but not to the prejudice of its creditors. (V. C. 1873, ch. 57, §§ 26, 29; V. C. 1887, ch. 47, §§ 1130, 1131, 1133.) This last is no immaterial qualification, for the capital stock of a corporation is a trust-fund for the payment of its debts, and the directors of a corporate body are the trustees. The duty is a sacred one, and cannot be disregarded. The obligation of a subscriber, therefore, to pay his subscription, can neither be released nor qualified to the prejudice of the creditors of the company. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or

give away. They are bound to call in what is unpaid, and to husband it carefully when received, as well as to apply it faithfully. (*Burke v. Smith*, 16 Wal. 395; *Sawyer v. Hoag*, 17 Wal. 620; *Tuckerman v. Brown*, 33 N. Y. 297; *Ogilvie v. Knox*, Ins. Co. 22 How. 387; *Upton v. Tribilcock*, 1 Otto (91 U. S.), 48; *Webster v. Upton*, 1 Otto (91 U. S.), 71; *Sanger v. Upton*, 1 Otto (91 U. S.), 60 & seq.)

A stockholder who has given a *stock-note* to the corporation for the purchase-money of the stock, that is, a note creating a lien on his stock, to secure the amount due, cannot, upon the insolvency of the company, transfer his stock, even with the consent of the directors, to an irresponsible person, and so, by substituting that person's note for his own, evade his liability. That would be virtually to withdraw so much of the capital of the corporation, and so to prejudice either the creditors, who to that extent must go unpaid, or his fellow-members in like predicament with himself, who, having given stock-notes, will then have to pay a larger proportion thereof. (*Nathan v. Whitlock*, 9 Pai. (N. Y.) 152.)

Any *radical* or even any *material change* in the charter, *seriously prejudicial* to the shareholder's interest, and *without his consent*, absolves him from all liability to pay subsequent assessments. (*Ang. & A. Corp.* (10th ed.) § 537, &c.; *Hartford & N. H. R. R. Co. v. Croswell*, 5 Hill (N. Y.), 383; *Middlesex Turnpike Co. v. Swan*, 10 Mass. 384; *Same v. Walker*, Id. 390. But see *London & B. R. Co. v. Wilson*, 6 Bingh. N. C. (37 E. C. L.) 135.) And where a change not of this radical, material, and injurious character is made in the charter, at the instance of a legally constituted meeting of the society, a member not present at the meeting cannot be heard to complain of the change. (*Currie v. Mut. Assur. Soc.* 4 H. & M. 315.)

It is proper also to observe, that although a stockholder in a corporation may enjoin it from employing its property or powers for a purpose wholly or materially different from that designed by the act of incorporation, yet a court of equity will not enjoin it from doing what is in direct furtherance of the object of its creation, and is for the benefit of all the stockholders, as such; although to the complaining shareholder it may be injurious in another character; or although the interest of some other person, or of the public, may be injuriously affected by the work about to be executed. (*Balt. & O. R. R. Co. v. Wheeling*, 13 Grat. 75-'77.)

As to the right of one or more corporators to enjoin the majority, because their administration is deemed injurious, see *Ang. & A. Corp.* § 512. An injunction will always be

granted in cases of fraudulent action by the majority of corporators, or by the directors. (*Dodge v. Woolsey*, 18 How. 331, 333, 341; *Kochler v. Black Riv. Falls Iron Co.* 2 Black. 721, 719, 720.)

Where a corporation is empowered to increase its capital stock, each shareholder, in the absence of any provision to the contrary, in the act allowing the increase, is entitled to his proper proportion of the benefit thence arising, either by increasing proportionably the number of his shares, or by enjoying the profit arising from their sale at a premium, and if denied this right by the corporation or its officers, he may maintain a special action of assumpsit against the corporation for the loss he may thereby sustain. (*Gray v. Portland Bank*, 3 Mass. 364.)

It seems to be the prevailing doctrine, that where the subscription is for a given number of shares, and it is by statute allowed to the company to sell the shares if the subscriber is delinquent, (the statute giving no personal remedy against him, nor he himself expressly promising to pay the same), no action lies to recover assessments or instalments from time to time duly demanded, nor is there any other remedy than the statutory one of *selling the shares*. In order to warrant a personal demand, and action, in such cases, it is said there must be an engagement by the subscriber to pay *all legal assessments upon the shares*. (*Andover Turnpike Co. v. Gould*, 6 Mass. 40; *Same v. Hay*, 7 Mass. 102; *N. Bedford Turnpike Co. v. Adams*, 8 Mass. 138; *Franklin Glass Co. v. White*, 54 Mass. 286; *Ripley v. Samson*, 10 Pick. 371 '2.) This, however, is not in accordance with the ordinary analogies of the law, the allowance of a special remedy in the absence of negative words not usually dispensing with the common law remedial processes. Accordingly, in many of the States the remedy by a sale of the shares is merely *cumulative*, and does not impair the common remedy by action against the subscriber's person. (*Berne v. Cahawba, &c. R. R. Co.* 3 Ala. (N. S.) 660; *Highland Turnpike Co. v. McKean*, 11 Johns. 39; *Herkimer M. & H. Co. v. Small*, 21 Wend. 273; *Troy Turnpike & Railroad Co. v. McChesney*, Id. 296; *Grat. v. Redd*, 4 Monroe, (Ky.) 103; *Instone v. Bridge Co.* 2 Bibb. (Ky.) 577; (5 Am. Dec. 638); *Tar River Nav. Co. v. Neal*, 3 Hawks. (N. C.) 520; *Hightower v. Thornton*, 8 Georgia 486; (52 Am. Dec. 423.) In Virginia all doubt is removed by statute, which declares that if the money due on the shares subscribed be not paid by the stockholder, as required by the president and directors, it may be recovered with interest, by *warrant, action, or motion*, or the shares may be sold, after notice in a newspaper for one month, at public auction, for ready money;

and if there be no sale for want of bidders, or the sale shall not produce enough to pay the charges and the money which ought to be paid, with interest, the company may recover the residue, with interest, by warrant, action, or motion. (V. C. 1873, ch. 57, §§ 23, 25; V. C. 1887, ch. 47, §§ 1127, 1129; *Grays v. Turnpike Co.* 4 Rand. 683-'4.)

4^b. The Powers and Modes of Action of Corporations.

We are to contemplate under this head, (1), The modes of action of corporations; (2), The powers of corporations; and (3), The disabilities of corporations;

W. C.

1^c The Modes of Action of Corporations.

The *action of corporations* universally takes place in, or in pursuance of orders of *corporate meetings*; in respect to which it is a rule that they must be, (1), Held at the proper *place*; (2), At the proper *time*; (3), After proper *notice*; and (4), Must consist of proper *persons*, governing their action by proper *rules*;

W. C.

1^d. The Time of Meeting.

In order to guard against surprise, the meetings are required to be held, either at times appointed by the charter or by-laws, or at times of which the several corporators shall be duly notified. (*Rex v. May*, 5 Burr. 2682; *Rex v. Hill*, 4 B. & Cr. (10 E. C. L.) 426; *Rex v. Liverpool*, 2 Burr. 731 & seq.; *Rex v. Doncaster*, Id. 744.)

In Virginia we have some statutory directions which must be noticed. We have already seen how the subscribers are to be notified of the first meeting for *organization*. The *annual meeting* is to be held on the day prescribed by law, or if none be prescribed, on the day appointed from time to time by the stockholders, in general meeting; and a general meeting may be held at any time upon the call of the board of directors, or of stockholders holding together *one-tenth* of the capital stock, upon their giving notice of the *time and place* of such meeting for *thirty days* in a newspaper published in or near the place where the last annual meeting was held. (V. C. 1873, ch. 57, §§ 8 to 11; V. C. 1887, ch. 47, §§ 1114 to 1117; *Burr v. McDonald*, 3 Grat. 215.)

2^d. The place of Meeting,

The place of meeting is either such as is appointed by law or by the charter, or such (being reasonable and proper, and within the limits of the State which created the corporation), as shall be made known to the corporators a reasonable time beforehand. (*Ang. & A. Corp.* 10th ed.) §§ 274, 496-498; *Rex v. May*, 5 Burr. 2682.)

In Virginia we have statutes regulating the *place*, as well as the *time*, for the meetings of joint stock companies.

The place of the meeting *for organization* has been previously noticed. The place for the *annual meeting* is fixed from time to time by the directors, and notice *published for two weeks* in a newspaper. The provisions for a place for *any general meeting* have been described under the foregoing head. (V. C. 1873, ch. 57, §§ 8, 9, 10; V. C. 1887, ch. 47, §§ 1113 to 1117.)

3^d. The Notice of the Meeting.

Where times and places are appointed for the meetings by law or by charter, or by by-law or usage, every member is presumed to know them, and no special notice is requisite. But if the business to be done is such as is not ordinarily transacted at such meetings, notice that it is to be brought up is necessary; *e. g.*, the election or amotion of an officer, or the enactment of a by-law, etc.; and in the absence of such notice, the transaction of business of that kind is illegal, unless *all the corporators are present, and all assent*. (Rex v. Liverpool, 2 Burr. 731, &c.; Rex v. Doncaster, Id. 744; King v. Theodorick, 8 East. 545; King v. Gaborian, 11 East. 77; Rex v. May, 5 Burr. 2682; King v. Faversham, 8 T. R. 356; King v. Langhorn, 4 Ad. & El. (31 E. C. L.) 538; Burr v. McDonald, 3 Grat. 315.)

The summons must proceed from some one who has authority to assemble the corporators, and must be served *personally* upon every resident member, or if non-resident, upon an agent, or must be left at his dwelling, save in those cases where a service through the newspapers is *expressly allowed*. (King v. Gaborian, 11 East. 86, n.; King v. Hill, 4 B. & Cr. (10 E. C. L.) 441; V. C. 1873, ch. 57, §§ 8, 9, 10; V. C. 1887, ch. 47, §§ 1114 to 1116.)

4^d. The Persons who should compose the Meeting, and the Rules which should Govern their Action.

The persons to compose the meeting are, of course, the corporators and their proxies; and the proportion of members which shall constitute a *lawful meeting* (which is styled a *quorum*), and also the proportion of those present on any occasion, which shall *determine the will* of the body, may be, and generally are, ascertained by the charter, or by a general law. Thus, in Virginia, by statute (V. C. 1873, ch. 57, § 11; V. C. 1887, ch. 47, § 1115), the *quorum* of any joint-stock company, other than a bank of circulation, is a *majority of all the votes* that can be given by all the stockholders, and of a *bank of circulation*, any number of a lawful meeting *that may be present*. The statute does not direct by what proportion of the votes present the will of the meeting shall be determined. The rule of the common law, which is applicable wherever the charter and the statutes are silent, is that, where the corporation consists of a *definite number* of persons (such as

railroad and turnpike companies, banks, etc.), there must be present persons who can give a *majority of all the votes* which could be given by all the members; and a majority of the votes given in such a meeting determines the action of the corporation. And where the corporation is composed of an *indefinite number* of persons (such as cities, towns, etc.), any portion of the body, however small, if it be *duly assembled*, forms a *quorum*, or legal corporate meeting, and a majority of the votes given in such meeting prevails. (Bac. Abr. Corp. (E.) 7.)

Where a corporation consists of several distinct parts (often called *integral parts*), there must be present at a corporate assembly a proper *quorum*, according to the foregoing principles, of each integral part (King v. Bellringer, 4 T. R. 822 & seq.; King v. Devonshire, 1 B. & Cr. (8 E. C. L.) 609; King v. Morris, 4 East. 26; King v. Thornton, 4 East. 294): and upon like principles, if an act is required to be done by the *mayor and aldermen*, or by the *president and directors*, the *mayor*, in the one case, and the *president*, in the other, is an indispensable part of the meeting, and all that is done *in his absence* is void. (King v. Buller & al. 8 East. 389; King v. Williams, 2 M. & S. 141; 7 Cow. 526.)

In reckoning the votes, it is most natural and just to allow one vote to each share, thus giving to each stockholder a weight of influence proportioned to his interest, a principle not admissible in *political societies*, for several reasons, and amongst others, because those societies have other interests to protect and cherish besides those of *property*, and because, moreover, the single vote of the property holder generally controls other votes besides, thus indirectly enduing him with a weight in some degree corresponding with his property interests. But it has not been usual in Virginia to allow one vote to each share, although in an increasing number of charters, including all granted by the circuit court, it is so provided, and now apparently in all cases. (V. C. 1873, ch. 57, § 62; V. C. 1887, ch. 47, §§ 1148, 1116.) And it should be added that when a vote is offered at any meeting upon stock transferred within sixty days before the same, if any one present object to the vote, it shall not be counted, unless the stockholder makes oath that the stock on which he offers to vote is held *bona fide*, and not by a transfer made with intent to multiply votes illegally. (V. C. 1873, ch. 57, §§ 12, 13; V. C. 1887, ch. 47, § 1117.)

The books and minutes of a corporation are usually satisfactory, but *not conclusive* evidence of what they contain; and so documents to which the corporate seal is attached are, upon proof of the seal, for the most part

sufficiently authenticated, but the seal is *not conclusive*. (Grays v. Turnpike Co. 4 Rand. 578, 581 '2.)

The recording officer of a corporation may certify copies of its records; and his certificate is evidence of the verity of such copies, but *not of facts* connected with the corporation. (Oakes v. Hill, 14 Pick. 442.)

2^o. The Powers of Corporations.

The powers of corporations, as well at common law as in Virginia, may be satisfactorily exhibited, as has already been briefly stated (*Ante*, pp. 572, &c.) under the heads following, viz. :

- 1, The Power of having Perpetual Succession ;
- 2, The Power of having a Common Seal, and Changing it at Pleasure ;
- 3, The Power of Contracting and being Contracted with ;
- 4, The Power of Taking, Holding, Transmitting and Alienating Property, and Otherwise Acting in such Matters like a Natural Person ;
- 5, The Power of Suing and being Sued : and
- 6, The Power of Making By-Laws, not Contrary to the Laws of the Land ; to which Chancellor Kent Proposes to add,
- 7, The Power to Remove Members and Officers.

These powers, even at common law, are tacitly incident to every corporation, so far as they are not restrained by the charter, although no mention of them be made. (1 Bl. Com. 475 ; 2 Kent's Com. 277 '8 ; *Ante*, p. 573 ; V. C. 1873, ch. 56, § 1 ; V. C. 1887, ch. 46, § 1068 ; Sutton's Hospital, 10 Co. 30 b ; Norris v. Staps, Hob. 211 a) ;
W. C.

1^a. Power to have Perpetual Succession.

Although every corporation possesses the *capacity* to have perpetual succession conferred upon it, it is, in fact, generally limited in its duration, either by the charter or by general law. Thus, in Virginia, *mining and manufacturing* companies are limited to a period of *thirty years*, and no longer. (V. C. 1873, ch. 57, §§ 38, 36 ; V. C. 1887, ch. 47, §§ 1143, 1210, 1240.) And there is, moreover, reserved to the legislature the power to alter, amend or repeal the charter of a *mining or manufacturing* company after fifteen years, or the charter of any other than an *internal improvement company* after the same period, and of an internal improvement company, or of any company chartered by the circuit court, &c., at pleasure. (V. C. 1873, ch. 57, §§ 38, 64 ; Id. ch. 56, § 1 ; V. C. 1887, ch. 47, § 1143 ; Id. ch. 51, § 1240.)

See further as to the power of the State over *internal improvement companies*, V. C. 1873, ch. 61, §§ 55 to 61 ; V. C. 1887, ch. 51, §§ 1239 & seq.

The provision, however, which justice requires, is made

that no law shall be passed taking from a company its works or property without making it just compensation, nor for changing its tolls without its assent, unless where specially provided in chapter 51. (V. C. 1887, ch. 51, § 1240.)

And let it be remembered, that whilst the charter of every *private corporation* is a contract, and so, in pursuance of Art. I., § x., 1, of the United States Constitution, cannot be altered or otherwise impaired without the consent of the corporators (in the absence of any authority reserved in the charter so to do), yet that does not prevent a State, in the exercise of its *right of eminent domain*, from abolishing the corporation, or appropriating its franchise, like any other property of individuals, when necessary for the public advantage, upon providing a *just compensation* to the corporation. (Terrett v. Taylor, 9 Cr. 52; Dartmouth Coll. v. Woodward, 4 Wheat. 518, 526; James Riv. & K. Co. v. Thompson, 3 Grat. 270.)

A question has been made by an eminent jurist (1 Tuck. Com. 162, B. I.), as to the character of a *fee-simple estate* in lands granted to a corporate body whose duration is limited to a few years; but there seems to be no difficulty in apprehending that the fee-simple passes, according to law, to the assigns of the corporation at its dissolution. The estate remains, although the artificial person who first enjoyed it has ceased to exist. (2 Bl. Com. 108; V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420.)

2^d. Power to have a Common Seal, and to Change the Same at Pleasure.

Blackstone states that a corporation can bind itself no otherwise than *under its corporate seal*, and that doctrine is fully sustained by the case of Taylor v. Dulwich Hospital, 1 P. Wms. 655; but it has been much qualified of late years in England (London Dock Co. v. Sinnot, 8 El & Bl. (92 E. C. L.) 351; Nicholson v. Bradfield Union, 1 Q. B. (Law Reps.) 620, 622, and cases there cited and marshal-led), and in the United States has been quite superseded. The American doctrine is, that a corporation may bind itself—

- 1, Under its corporate seal;
- 2, By vote of a majority of the corporators, entered in the corporation records, at a lawful meeting;
- 3, By vote of the directors duly taken, and entered in their minutes—or *perhaps* not written;
- 4, By agents duly appointed, whose authority may be proved by any satisfactory or competent evidence; or,
- 5, By accepting, knowingly, the benefit of the contract, or otherwise ratifying it.

See Legrand v. H. S. College, 5 Munf. 324; The Banks v. Poiteaux, 3 Rand. 143; 2 Kent's Com. 290-'91 & n. (b); Bank of Columbia v. Patterson, 7 Cr. 305; Dunn v. Rec-

tor, &c. 14 Johns. 118; *Fleckner v. Bank of U. S.*, 8 Wheat. 338; *Eureka Co. v. Bailey Co.*, 11 Wal. 491; *Burr v. McDonald*, &c. 3 Grat. 215; *Bac. Abr. Corp.* (D.).

At common law, the seal of a corporation, like that of an individual, was long held without dissent to be nothing else than an *impression on wax, wafer, or some other lustritious material*, and not directly on the paper or parchment. (Ang. & A. Corp. (10th ed.) § 218; *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 228 '9; *Farmers' Bank v. Haight*, 3 Hill, 494 '5.) It need not, however, be its own seal, for sealing is *cera sigillo impressa*; and, as is remarked in Sheppard's Touchstone, "if the party seal with a stick, or any such like thing, which doth make a print, it is good. And although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse." (Shep. Touchst. 57; Perk. Sect. 134; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 428.) See also *Eureka Co. v. Bailey Co.*, 11 Wal. 491.

But of late very imposing authorities countenance the doctrine, that even by the *common law*, a seal may be an impression on any substance capable of receiving and retaining an impression, and therefore as well on the *paper or parchment* as on *wax or wafer*. (Reg. v. St. Paul, 7 Q. B. (53 E. C. L.) 238-'9; 1 Sugd. Pow. 282-'3, ch. VI., § iv., 9 Pillow v. Roberts, 13 How. 473 '4; *Follett v. Rose*, 3 McLean, 332; *Curtis v. Leavitt*, 17 Barb. (N. Y.) 318; S. C. 15 N. Y. 9.)

In Virginia, it is enacted (V. C. 1873, ch. 15, § 9, cl. 12; V. C. 1887, ch. 2, § 5, cl. 12; *Id.* ch. 133, § 2841), that in cases where the seal of *any corporation, court, or public officer* shall be required to be affixed to any paper, the word "*seal*" shall include the impression of the official or corporate seal made upon the *paper alone*, as well as one made by means of a wafer, or of wax affixed thereto; and it was quite usual even prior to the Code of 1887, for even *private corporations* to assume that this relaxation applied to them. Such a construction seems hardly warranted, and it is believed that instruments thus executed cannot be deemed *sealed instruments* under this statute, although they are so under the Code of 1887 (*Supra*), and *perhaps*, or it should rather be said *possibly*, may be so, at *common law*. There is yet another statute (V. C. 1873, ch. 140, § 2; V. C. 1887, ch. 133, § 2841), which declares that "any writing to which the *person* making it shall *affix a scroll by way of seal* shall be of the same force as if it were actually sealed." And this, if it stood alone, might tend to justify the assumption that a corporation (which is a *person*, V. C. 1873, ch. 15, § 9, cl. 13; V. C. 1887, ch. 2

§ 5, (cl. 13), may employ such a scroll as a seal; but in the statute first cited is a provision that "in any case in which the seal of any *natural person* shall be required to a paper, it shall be sufficient for *such person* to affix to such paper a scroll by way of seal," (V. C. 1873, ch. 15, § 9, cl. 12; V. C. 1887, ch. 2, § 5 (cl. 12), whence it is inferred that the word *person*, in the enactment under consideration (V. C. 1873, ch. 140, § 2; V. C. 1887, ch. 133, § 2841) would not include artificial persons, and consequently that a corporation could use no other than the *common law seal*, whether that be an impression *upon wax*, or upon the *paper or parchment*. But by the Code of 1887 it is especially declared that "the impression of a corporate or official seal or *paper or parchment* alone shall be as valid as if made on wax or other adhesive substance." (V. C. 1887, ch. 133, § 2841.)

The seal is to be affixed as the charter prescribes, or if the charter be silent, by the person whom the by-laws or the resolution of the proper authorities shall designate. (Ang. & A. Corp. (10th ed.) § 223; Hill v. Manchester, &c. Water-Works, 5 B. & Ad. (27 E. C. L.) 866; Burr v. McDonald, 3 Grat. 255.) Hence, whilst the corporation seal affixed to a document by the officer having the legal custody of it is *prima facie* to be presumed to have been rightly affixed, without producing the records of the corporation (Clarke v. Imperial Gaslight Co., 4 B. & Ad. (24 E. C. L.), 315; Eureka Co. v. Bailey Co., 11 Wal. 458), yet if it be proved not to have been done by proper authority, or that it was to be delivered only on *conditions*, etc., which did not exist, it will have no validity as a sealed instrument. (Ang. & A. Corp. (10th ed.) § 224.)

An agent can only execute a *sealed instrument* for a natural person in that person's presence, or by virtue of a *sealed authority*; but in the case of a *corporation aggregate*, it is of necessity sufficient to authorize the agent to affix the corporate seal *by vote*; for as the seal could only be put to the power of attorney by vote, it may as well be put *by vote* to the contract itself. (Burr v. McDonald & als., 3 Grat. 235; Ang. & A. Corp. (10th ed.) § 224.)

For the formal mode of executing a deed of a corporation, see Ang. & A. Corp. (10th ed.) §§ 225 & seq.; Grayd. Forms, 103; Woodmass v. Mason, 1 Esp. 53; Moises v. Thornton, 8 T. R. 303.

Lastly, upon this topic, the agent who executes the deed of a corporation, in its name, is "*the party executing the deed*," who is to acknowledge the same within the *statutes of registry*. (Ang. & A. Corp. (10th ed.) § 225; V. C. 1873, ch. 117, §§ 2, 3; V. C. 1887, ch. 111, §§ 2500, 2501.)

3^d. Power to Contract and be Contracted with.

A corporation possesses inherently the power, whether

named in the charter or not, to make any *lawful* contract not forbidden by the charter, which is necessary, either directly, or incidentally, to enable it to accomplish the purposes for which it was created. (Ang. & A. Corp. (10th ed.) §§ 110, 238, 271.) Upon such contracts no personal liability attaches at common law to the individual corporators—a particular wherein there is a marked diversity between corporations and *general* partnerships; wherein our law accords with that of Rome. (1 Bl. Com. 484; Edmunds v. Brown & al. 1 Lev. 237; Dig. Lib. III., Tit. 4, § 7.)

Let us note then, (1), The modes in which a corporation may contract; (2), With whom and in what manner a corporation may contract; (3), What contracts a corporation may make; and (4), The appointment of an agent by a corporation:

W. C.

1°. The Modes in which a Corporation may Contract.

It may contract, so as to bind itself, not only under the corporate seal, but in the United States, in *four other modes*, as described, *Ante*, p. 592.

The members of a corporation aggregate, being many, are constrained to make their contracts either by agents or by vote; and they cannot give their consent *separately and individually*, so as to oblige the body, but must do it in general meeting, *lawfully assembled*. (1 Bl. Com. 475; Soc. of Pract. Knowl. v. Abbott, 2 Beav. Ch. R. (17 Eng. Ch.) 559; Ang. & A. Corp. (10th ed.) § 232.)

2°. With Whom, and in what Manner, a Corporation may Contract.

A corporation may well contract with one of its own members; and if several corporations consist of *the same persons*, they may yet validly contract as between themselves. (Ang. & A. Corp. (10th ed.) § 233; Burr v. McDonald, 3 Grat. 236.)

The *name* by which a corporation contracts ought to be its true name, of which, however, enough has already been said. (Bac. Abr. Corp. (C.) 2, 3; Culpeper Manuf. Soc. v. Digges, 6 Rand. 167; Mayor, &c., of Lyme Regis, 10 Co. 126 a; Moyle Finch's Case, 6 Co. 65 a & b.)

Mutuality, valuable consideration, and all the other elements necessary to the legality of the contracts of natural persons, are in like manner necessary in the contracts of corporations. (Ang. & A. Corp. (10th ed.) § 255.)

3°. What Contracts a Corporation may make.

In general it may make any contract not prohibited by its charter, and necessary, directly or incidentally, to enable it to accomplish its corporate purposes, and it may make none others (Head v. Prov. Ins. Co. 2 Cr. 127; Dartmouth Coll. v. Woodward, 4 Wheat, 636; Bank of U. S.

v. Dandridge, 12 Wheat. 64; Bank of Augusta v. Earle, 13 Pet. 587; Pearce v. M. & J. R. R. Co. 21 How. 443; Parrine v. Ches. & Del. Can. Co. 9 How. 172); and may bind itself to perform such contracts *at any place*. (Ang. & A. Corp. (10th ed.) §§ 256, 275.) But let it be observed, that a corporation limited in its transactions to a certain *locality* cannot make a valid contract beyond the limits assigned. (Korn v. Mut. Ass. Soc. 6 Cr. 199; Ang. & A. Corp. (10th ed.) § 261.)

A *municipal* corporation cannot divest itself, by contract, of the power of legislation conferred *for the public weal* by the charter, although the city may be liable in damages for the breach of its agreement. (Gozzler v. Corp. Georgetown, 6 Wheat. 593; Presb. Ch. v. N. York City, 5 Cow. (N. Y.) 538; Coates v. Mayor of N. Y. 7 Cow. 604; City of Richmond v. Richmond & D. R. R. 21 Grat. 607 & seq.)

Restrictions upon a corporation, in respect to the making of contracts within the scope of its general purposes, are not favored. (The Banks v. Poiteaux, 3 Rand. 141 & seq.)

Although legislative acts divesting a corporation of any rights with which it is clothed by charter, such as a right to make certain designated contracts, a right to be exempt from taxation, etc., are void under the United States Constitution, as impairing the obligation of contracts (State Bank of Ohio v. Knoop, 16 How. 369; O. Life Ins. & Trust Co. v. Debolt, 16 How. 416; Dodge v. Woolsey, 18 How. 331; Mech. & Trad. Bank v. Debolt, 18 How. 380; Mech. & Trad. Bank v. Thomas, *Ibid.* 384; McGee v. Mathis, 4 Wal. 143; Wilmington R. R. v. Reid, 13 Wal. 264; Raleigh & G. R. R. Co. v. Reid, 13 Wal. 269; Home of Friendless v. Rouse, &c. 8 Wal. 430, 438, 439); yet except to that extent they are like natural persons, liable to be restrained by statutes from making certain contracts which before were not illegal. And in general, whatever is forbidden, in the way of contract, to natural persons, it is safe to assume is forbidden to corporations as well. (Rex v. Gardner, Cowp. 84 &c.; Ang. & A. Corp. (10th ed.) § 265.)

Thus, usury is as much forbidden to be practiced by a corporation as by a natural person; but in Virginia, by special statutory provision (V. C. 1873, ch. 57, § 39; *Id.* ch. 56, § 36; V. C. 1887, ch. 130, §§ 2825, 2826), usury is declared to be not available *as a defence*, to any "*corporation*," which includes towns as well as incorporated companies. And this provision repels the defence of usury by a corporation, even as to contracts made *before the date of the statute*. (Danville v. Pace, 25 Grat. 1.) The language of the statute, as it is contained in the Code of 1887, is,

"No corporation shall, by way of defence or otherwise, avail itself of any of the provisions of the preceding sections of this chapter (touching usury) to avoid or defeat the payment of any interest which it has contracted to pay." (V. C. 1887, ch. 130, § 2825.) It was no violent interpretation to regard this language as applicable to *existing* contracts; but it may be permitted to doubt whether the supreme court of the United States would not deem such a statute within the policy and intent of the constitutional prohibition of laws impairing the obligation of contracts.

And so, also, a corporation may be as much entitled to *salvage* for saving vessels, etc., in distress, as natural persons. (The *Island City*, 1 Black. 129; The *Camauche*, 8 Wal. 474, &c.) And so, when the law prohibits the issue of bills as *currency* by any but authorized banks, a *municipal* and every other corporation is included in the prohibition, and the holder of such bills cannot recover upon them. (Thomas v. City of Richmond, 12 Wal. 349.) On the other hand, an effect is allowed in some instances to contracts of corporations, apparently from considerations of general convenience, and from usage, which does not belong to the contracts of natural persons. Thus, *coupon bonds* of corporations, payable *to bearer*, are now, by unquestionable usage throughout the United States, recognized as *negotiable*, that is, as transferable merely by *delivery*, and so transferable as to vest in the transferee a *legal title*; and so likewise are the *coupons* attached to such bonds, as well after they are separated from the bonds, and in the hands of a different holder, as whilst they continue united therewith. (White v. Vermont & Mass. R. R. Co., 21 How. 577; Comm'rs v. Aspinwall, Id. 546; Gelpeke v. Dubuque, 1 Wal. 206; Mercer Co. v. Hackett, Id. 95; Thompson v. Lee Co., 3 Wal. 331-'2; Aurora City v. West, 7 Wal. 105; Comm'rs of Manor v. Clark, 4 Otto (94 U. S.), 279; Virginia v. Ches. & O. Can. Co. 32 Md. 501; Spooner v. Holmes, 102 Mass. 503; Saybel v. Nat. Curr. Bank, 54 N. Y. 288; Arents v. Com'th, 18 Grat. 773.)

It is the policy of Virginia (and of many others of these States) to prohibit any company other than a banking company of its own incorporation, from circulating within its limits, as *currency*, any note, bill, or other paper or thing, or otherwise carrying on business as a *bank of circulation*. All contracts connected with such dealings are declared to be void, and the capital of such companies is forfeited to the commonwealth. (V. C. 1873, ch. 60; V. C. 1887, ch. 50; Wilson v. Spencer, 1 Rand. 76.) Hence, as we have seen, if a *municipal corporation*, having no such *banking power*, issue bills as *currency*, there can be no re-

covery upon them (Thomas v. City of Richmond, 12 Wal. 349); and so, also, if a foreign *bank of circulation* lends its bills in *Virginia*, and takes a note or other security therefor, the contract of loan and the security are voidable under this statute; but if the bills be lent to a *citizen of Virginia* beyond the limits of the commonwealth, and where the transaction is not illegal, the contract is not within the prohibition of the statute, and is unimpeachable. (Bank of Marietta v. Pindall, 2 Rand. 474; Rees v. Conococheague Bank, 5 Rand. 329; Hamtramck v. Selden & als. 12 Grat. 30, 31.) And where the original contract (such as a loan) is legal, any transaction incidental thereto (such as a mortgage or deed of trust), although made in a State whose laws would have forbidden the primary contract to be made within its limits, is also legal. Thus, a Pennsylvania bank having at *its own banking house*, lent its own bills to a citizen of New York, which it afterwards secured by a mortgage on the debtor's lands in New York, the courts of the latter State enforced the mortgage. (Silver Lake Bank v. North, 4 Johns. C. R. (N. Y.) 370.)

Whilst in general a corporation, where the charter is silent, may make any contract which may be proper for the purpose for which it was created, and *none other* (V. C. 1873, ch. 56, § 2; V. C. 1887, ch. 46, § 1070; Broughton & als. v. Manchester, &c. Water Works Co., 3 B. & Ald. (5 E. C. L.) 1; Meyer v. City of Muscatine, 1 Wal. 391), yet there are some transactions which, by charter or by general statute, are specially prohibited to corporations; as in *Virginia*, to subscribe to the stock of another company, or otherwise acquire it, except as specially allowed by law, or as *security for, or in payment of*, a debt (V. C. 1873, ch. 56, §§ 2, 3; V. C. 1887, ch. 46, §§ 1070, 1071); and in case of corporations created by the *circuit court*, to make a lien, to *prefer one or more creditors* to others (except to secure a debt contracted or money borrowed at the date of the lien), it being declared that all such liens of preference, except as above, shall enure to the benefit ratably of *all the existing creditors*. (V. C. 1873, ch. 57, § 63; V. C. 1887, ch. 47, § 1149.) This statute seems to have been suggested by the case of Burr's Ex'ors v. McDonald & als. 3 Grat. 215, which allowed such a preference; and of course it is to be construed with reference to the bankrupt law (when one is in force), whose policy it tends to support.

A corporation, as we have seen, must *dwell* in the place of its creation, and cannot *migrate* to another sovereignty; but it may, by its agents, enter into any contract abroad which *its own charter and the local law* may permit. And it is assumed that the local law permits every transaction

which it does not expressly or impliedly forbid. Thus, the Bank of Augusta, located at Augusta, Georgia, by its agent, having purchased in Mobile, Alabama, a bill of exchange for \$6,000, drawn in favor of and endorsed by one Earle, and the bill being protested for non-payment, instituted suit thereon against Earle; and it was held by the supreme court of the United States, that as the charter of the bank permitted the transaction, and as nothing appeared in the laws of Alabama adverse to it, it was legal and valid, and that the bank should recover. (*Bank of Augusta v. Earle*, 13 Pet. 585. See, also, *Tombigbee R. R. Co. v. Kneeland*, 4 How. 16; *Lafayette Ins. Co. v. French*, 18 How. 405; *St. Louis v. Ferry Co.*, 11 Wal. 429.)

In pursuance of the principle that a corporation can enter into no transaction, nor make any contract, which does not tend to accomplish the purpose for which the company was created, it is understood to be the established doctrine that, whenever it has power to borrow money, it may secure it by bond, note or bill, and also by mortgage or by deed of trust on its *property*, real and personal, unless expressly prohibited by its charter; but it cannot mortgage or assign its *franchises* without special legislative authority, contained in its charter or otherwise; for that would be to depute and transfer to another a personal trust and confidence which the sovereign authority has thought fit to confer upon and limit to the corporation itself. (Green's Brice's *Ultra Vires*, 123 & seq.; *Pierce, Rail Roads*, 496, 514-'15; *Coe v. Pennoek*, 23 How. 117; *King v. Merch. Exch.* 1 Seld. (N. Y.) 547; *Nelson v. Eaton*, 26 N. Y. 410; *Susquehanna Br. Co. v. Gen. Insur. Co.* 3 Md. 305; *Bardstown & L. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; *Coe v. Johnson*, 18 Ind. 218; *Wh. Wat. Val. Can. Co. v. Villette*, 21 How. 414; *Lenox v. Roberts*, 2 Wheat. 373; *Pope v. Brandon*, 2 Stew. (Ala.) 401; *York & Md. R. R. Co. v. Wimans*, 17 How. 39; 1 Redf. Am. Railway Cas. 575; 2 Do. 621; *Thomas v. W. Jersey R. R.* 11 Otto (101 U. S.) 71, 82 & seq.; *Burr v. McDonald*, 3 Grat. 206.) But the legislature may, by subsequent act, either directly or by implication, ratify a transfer by way of conveyance, lease or mortgage, which, for want of legislative authority, was defective. (Green's Brice's *Ultra Vires*, 125, note; *Shaw v. Norfolk R. R. Co.* 5 Gray (Mass.) 162; *Hall v. Sullivan R. R. Co.* 2 Redf. Am. Railway Cas. 621.)

In Virginia, sundry statutory provisions prescribe the powers, duties, rights, exemptions, and privileges of corporations created for purposes of internal improvement, such as railroad, canal, and turnpike companies. (V. C. 1873, ch. 61; V. C. 1887, ch. 51.) Thus, such a company

is allowed to construct and maintain along its line of improvement an electric telegraph or telephone for its own use and that of the public, and make reasonable charges on messages and intelligence conveyed thereby. (V. C. 1873, ch. 61, § 42; V. C. 1887, ch. 51, § 1231.) And, amongst other things, it is enacted that such a company shall not borrow any money until the capital stock *subscribed* has been paid up (except *insolvent and delinquent* shareholders!) and expended or appropriated; but it may borrow a sum not exceeding the part of the capital stock *unsubscribed*, and may make the certificates of debt therefor convertible at the pleasure of the holder, within a time prescribed, into the stock of the company. (V. C. 1873, ch. 61, § 43; V. C. 1887, ch. 51, § 1232.) Such a company is also empowered to make a mortgage or deed of trust of "*all its works and property*," and the purchaser under such deed of trust or mortgage, or under the decree of any court having jurisdiction, will succeed, not only to the property, but also to the *franchises*, rights, privileges and duties of the company (but without liability for its debts, and without being entitled to debts due to it), and will forthwith become a new corporation, with the same objects, powers, privileges, and duties as its predecessor, and may be immediately organized under the same or a different name, the former corporation being *ipso facto* dissolved, with the usual consequences of dissolution (V. C. 1873, ch. 61, §§ 44-47; *Id.* ch. 56, § 31; V. C. 1887, ch. 51, §§ 1233, & seq.; *Id.* ch. 46, § 1103); *Alex. & F. R. R. Co. v. Graham*, 31 *Grat.* 781-'2). The mortgage or deed of trust, however, of all its effects having the effect to close its concerns, and virtually to terminate its existence, cannot be made by the *directors* without special authority, but only with the assent of the shareholders in general meeting assembled. (*Stevens v. Davison*, 18 *Grat.* 827-'8; *R'way Co. v. Allerton*, 18 *Wal.* 234; *Ang. & A. Corp.* §§ 280 & seq.)

A railroad company may in equity mortgage as security for its debts duly contracted, not only the property belonging to it at the date of the mortgage, but such also as it may afterwards lawfully acquire, in the proper exercise of its *existing* franchises, and it seems, even its *future income*; but not any property, right or franchise, which, according to its charter at the *date of the mortgage*, it had no right to hold, assert or exercise; such as an extension of the road, under a charter subsequently granted, or the profits arising from such extension, and *a fortiori*, not an independent railroad, which it was afterwards permitted to annex to, or consolidate with itself. (*Green's Brice's Ultra Vires*, 125, note; 2 *Stor. Eq.* (8th ed.) §§ 1040, 1040

a; 3 Pom. Eq. §§ 1236, 1288 & seq., & n. 2; Pennock v. Coe, 23 How. 117; Dunham v. Cin. &c. R. R. Co. 1 Wal. 254; Galveston R. R. Co. v. Cowdrey, 11 Wal. 481; U. S. v. N. O. R. R. Co. 12 Wal. 362; R. R. Co. v. Soutter, 13 Wal. 517; Langston v. Horton, 1 Hare (23 Eng. Ch.) 556-557; Curtis v. Huber, 1 Jac. & W. 526; Mitchell v. Winslow, 2 Stor. 630; Gregg v. Sanford, 24 Ill. 17; S. C. 76 Am. Dec. 720, 723, note; Dunham v. Earle, 2 Redf. Railways, 506, n. 34; Id. 492 & seq.; State v. N. Cent. R. R. Co. 18 Md. 193; Garrett v. May, 19 Md. 177; Alex. & F. R. R. Co. v. Graham, 31 Grat. 774, 780 & seq.; Gilbert v. Wash. City, &c. R. R. Co. 33 Grat. 609.)

As to *rolling stock* of a railroad company, which may be pledged for its debts, as well as any other property belonging to it, there is a remarkable contrariety of opinion whether it is to be regarded as personal property, or as annexed to and passing, without being named, as part of the freehold of the road, to whose operation it is indispensable. As the rolling stock is not *attached* to the realty, it seems to be an extraordinary anomaly to treat it as constituting a part thereof, merely because the road cannot be successfully operated without it. With equal reason a cart, a plough, a mule, a wheel-barrow, or a spade might be deemed a part of a farm, inasmuch as the farm cannot be operated without such appliances. The various authorities upon the subject are marshalled in Green's *Brice's Ultra Vires*, App'x, pp. 681 & seq.

The lease of a railroad, with its *franchises*, by the great weight of authority, both in England and in the United States, is believed to be *ultra vires*, in the absence of special legislative authority, in the charter or otherwise, and it is not competent to the shareholders to sanction or ratify such a lease, either before or after it is made. It is not a question of the power and authority of the directors merely, but of the corporation itself, which cannot thus devolve upon another, duties, privileges, and powers which were conferred upon it for the public advantage. (Pierce, R. Roads, 496-7, 514 '15, 532 & seq.; East Anglian R. R. Co. v. East Cos. R. R. Co. 11 C. B. (73 E. C. L.) 775; Ashbury R. Car & Iron Co. v. Riche, L. R. 7 H. L. 653; Com'th v. Smith, 10 Allen, (Mass.) 448; Richardson v. Sibley, 11 Allen, 65; Middlesex R. R. Co. v. Boston, &c. C. R. R. Co. 115 Mass. 347; Pittsburg & C. R. R. Co. v. Alleghany Co. 63 Penn. St. 126; State v. Consolidation Coal Co. 46 Md. 1; Pearce v. Madison, &c. R. R. Co. 21 How. 441; York & M. L. R. R. Co. v. Winans, 17 How. 30; Thomas v. W. Jersey R. R. Co. 11 Otto (101 U. S.), 71.)

In Virginia, the question as to the legality, or the pro-

priety of such a lease has been repeatedly referred to, but never directly decided. It was expressly waived as not necessary then to be determined in *Stevens v. Davison*, 18 Grat. 827; and in *Balt. & O. R. R. Co. v. Wightman*, 29 Grat. 434 & seq., and *Balt. & O. R. R. Co. v. Noell*, 32 Grat. 397-'8, it was held that the corporation lessee, being engaged in operating a railroad in Virginia, was estopped to say that it was doing so without lawful authority, so that the question of the legality of the lease could not be raised. In *Winchester & S. R. R. Co. v. Colfelt*, 27 Grat. 779, the court of chancery ordered a lease of the railroad to be made for such time as would pay certain *judgments* sought by the bill to be charged on the road, and no question was raised as to the propriety of so doing; it being perhaps conceived that as equity might accomplish the same result by committing the road to a receiver, the discretion of the court might be relied on not by the lease to pervert the purposes and objects had in view in creating the corporation. And in *Gibert v. Wash. City, V. M. & G. S. R. R. Co.* 33 Grat. 601-606, the sanction given by the court to leases of other roads made *by and to* the defendant corporation, was placed, as to the latter, upon the assent of the legislature, as well as the manifest advantage of the lease to the corporation, which it was the duty of the court to regard; and as to the lease by the defendant corporation, upon the latter ground alone, which it was held that the creditors could not impugn. And in the same case it was even held that, under the direction of the court, the receiver might either build or lease a road which promised to be a valuable feeder to the line which he had in charge. (S. C. p. 586.)

It is not foreign to the subject of a corporation's contracts to take notice here of the principles which, in a court of equity, regulate the application of the funds of a railroad company in the hands of a receiver of the court, at the instance of mortgagees, or of other creditors of the company. Railroad mortgages, and the rights of railroad mortgagees, are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. In the case of an ordinary mortgage, the creditor, as a general rule, does not rely for payment so much on the rents and profits, as upon the *corpus* of the property. Repairs and improvements are, for the most part, not essential to his security; they are not invited by him, and he cannot be deemed to have authorized them by his silence or his acquiescence. A railroad mortgage stands upon a different footing. If the mortgage-debt is paid at all, it must be from the earnings of the road, whether operated by the original company, or by one that shall succeed to it, as purchaser, under a de-

creed of foreclosure and sale : and in order that there may be such earnings, constant repairs, replacements, and additional equipments are indispensable, besides the ordinary current expenses of operating the work. It is, therefore, not unreasonable to assume that every railroad mortgagee, in accepting his security, impliedly agrees that, until a foreclosure and sale of the property takes place, the operating and managing expenses, and the cost of needful repairs, proper equipments, and expedient improvements, shall be deducted from the gross earnings before he can affect to have any claim, and that his claim in fact embraces only the surplus or the net income thus arrived at. And if this is true whilst the road is yet in the hands of the corporation, it is much more true when it is placed by a court of equity in the possession of a receiver. Nor is the case varied though the mortgage give a lien in terms on the *profits and income*. It is still the *net income* only, arrived at as before. Hence, when a railroad is committed to a receiver, pending proceedings for a foreclosure, which is always a matter of sound discretion with the court, the court, when the order of commitment is made, or at any time afterwards, may in its discretion direct the gross income, during the receivership, to be applied to discharge not only the current expenses of operating the road, but also all outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, such as under the circumstances may seem warranted and called for by sound business considerations. (Fosdick v. Schall, 9 Otto (99 U. S.), 252 & seq.; Gilman v. Ill. & Miss. Tel. Co. 1 Otto (91 U. S.), 603; Am. Br. Co. v. Heidelberg, 4 Otto (94 U. S.), 798; Atkins v. Petersburg Railroad Co. 3 Hughes, C. C. 313 & seq.; Williamson v. Wash. City, V. M. & G. S. R. R. Co. 33 Grat. 628 & seq.)

Upon like principles, when the current earnings of a railroad company, which ought in equity to have been employed to pay *current debts*, contracted before the receiver's appointment, for labor, supplies, and other appliances for the operation and maintenance of the road, have been applied by the company to pay interest due to mortgage-creditors, to pay for additional equipments for the road, or for valuable and permanent improvements thereon, it is competent for the court to restore what has been thus diverted from the primary purpose in view, and to direct such debts to be paid out of the income in the receiver's hands, before anything from that source goes to the mortgage-creditors. And if the mortgage-creditors, or others, make advances in order to defray such charges, and to prevent the suspension or interruption of the business of the road, such advances are to be liquidated out of the current

income of the road after it comes into the custody of the court, through its receiver, just as the charges in the hands of the original creditors would have been, had they not been satisfied by the advances. Nor does this doctrine of the restoration of the fund rest upon the ground of a supposed lien upon the earnings of the road to defray the annual expenses, but upon the fact that the officers of the company are to be regarded as *trustees* of the road's earnings, for the benefit of the claims of various creditors; and if they have given to one class what properly belonged to another, the court, upon adjustment of the accounts, may so use the income in its hands as to restore the parties, if practicable, to their original rights. (Fosdick v. Schall, 9 Otto (99 U. S.), 252 & seq.; Hale v. Frost, Id. 389, 392; Atkins v. Petersburg R. R. Co., 3 Hughes, C. C. 315 & seq.; Williamson v. Wash. City, V. M. & G. S. R. R. Co. 33 Grat. 629.)

It is worth while to observe, that *in all cases of mortgage* (and the same is true of a *deed of trust*), it is well settled that so long as the debtor is allowed to remain in possession of the property, as well after default as before, he is entitled to receive and apply to his own use the income and profits of the estate pledged. And this is so, notwithstanding the security, *by its terms*, includes and covers the rents and profits, and although the creditor or trustee be *authorized* to take possession upon default made in the payment of the debt, or of the interest on it. These principles, while applicable to all mortgages, apply with peculiar force to mortgages of *railroad property*. So long as the company continues in possession, public policy comes in aid of the general doctrine above stated relating to mortgages generally, and requires that it should have the unlimited use and control of the road's earnings, in order to meet its current expenses, including repairs, replacements, supplies of all sorts, labor, and services of officers and servants, and so fit it to maintain the useful function for which it was devised. (Chinnery v. Blackman, 3 Dougl. (26 E. C. L.) 391; Galveston R. R. Co. v. Cowdrey, 11 Wal. 482-3; Gilman v. Ill. & Mo. Tel. Co. 1 Otto (91 U. S.), 616; Am. Br. Co. v. Heidelberg, 4 Otto (94 U. S.), 800; Gibert v. Wash. City, V. M. & G. S. R. R. Co. 33 Grat. 648-9.) And hence, if judgments are recovered against the company, and executions of *fiery facias* are issued, and placed in the sheriff's hands before possession is taken by the mortgagee, or trustee, or if a bill to foreclose is filed before the appointment of a receiver, the executions constitute a lien on the funds derived from income in the hands of the company, or on which, being in the hands of its servants, the company had claim at the

time of the appointment of a receiver, and the execution-creditors are entitled to have those funds and balances applied in satisfaction of their debts, in preference to the mortgage-creditors; and if they have been applied under the order of the court to other debts, they are to be replaced out of the revenues subsequently coming to the hands of the receiver. (*Gilman v. Ill. & Mo. Tel. Co.* 1 Otto (91 U. S.), 617; *Galveston R. R. Co. v. Cowdrey*, 11 Wal. 482-3; *Am. Br. Co. v. Heidelberg*, 4 Otto (94 U. S.), 800; *Gibert v. Wash. City, V. M. & G. S. R. Co.* 33 Grat. 649.)

4°. Appointment of an Agent by a Corporation.

It is plain that a corporation aggregate can contract and act no otherwise (at least as to the preliminary negotiations) than by the intervention of agents, either specially designated by the charter, or appointed by the corporation in pursuance thereof.

The power to appoint agents, like every other power, abides with the body of corporators, unless the charter or some general statute otherwise directs. And upon the maxim *delegatus non potest delegare*, the directors or other agents cannot appoint sub-agents, unless the power be expressly conferred by the charter, by general statute, or by the corporators in general meeting. (*Ang. & A. Corp.* (10th ed.) §§ 276, 277; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; *Tippets v. Walker*, 4 Mass. 595; *Emerson v. Prov. Hat Manuf. Co.* 12 Mass. 237; *Dana v. Bank of U. S.* 5 W. & Serg. (Pa.) 247; 6 Gill & J. (Md.) 363; *Burrill v. Nahant Bank*, 2 Met. (Mass.) 166-7; *King v. Mayor of Gravesend*, 2 B. & Cr. (9 E. C. L.) 602.)

Generally speaking, any persons may be appointed agents, including infants, married women, and members of the corporation. The charter may designate certain persons to be *exclusively* the agents of the corporation for certain purposes; and thus, although those persons may be appointed by the corporators, they derive their authority not *by delegation* but *from the charter*, and in such matters are the *sole representatives* of the corporation, whose acts are paramount in authority even to the body at large. Thus, when the directors of a banking company are by the charter charged in this manner with the exclusive management of the institution, the courts will not, at the instance of a majority of the shareholders, interfere with their *honest discretion*, even though it be injudiciously exercised, as, for example, in the division of the profits. (*Bank of U. S. v. Dandridge*, 12 Wheat. 113; *Com'th v. St. Mary's Church*, 6 Serg. & R. 508; *Dana v. Bank of U. States*, 5 Watts & S. 247; *Ang. & A. Corp.* (10th ed.) § 279.)

On the other hand, no agent can bind the corporation when he *exceeds his commission*. Thus, the president and cashier cannot generally make contracts discharging the debtors of the bank, nor altering their liability, such functions usually belonging to the *directors alone* (Bank of U. S. v. Dunn, 6 Pet. 59; Bank of Metropolis v. Jones, 8 Pet. 16); nor can the directors, as a general thing, obtain or accept a modification of the charter, or assign the effects, and wind up the concerns of the corporation, or increase the capital stock, or make any other organic change, without the assent of the shareholders. (Stevens & al. v. Davison, 18 Grat. 819; Railway Co. v. Allerton, 18 Wal. 234; Ang. & A. Corp. §§ 280 & seq.) But in any case, although the power of the agent be exceeded, yet if the shareholders in lawful meeting afterwards ratify the transaction, it renders it valid. (Crump v. U. S. Mining Co. 7 Grat. 360-'61, 372.)

It should be observed, that in the case of the public bonds of counties, cities, etc., the *bona fide* holders thereof for value are bound to look no further than to the statute law under which the bonds are issued. If there are any restrictions, limitations and conditions prescribed in the act, such *bona fide* holder has a right to assume that they have been complied with; and if it appears that the public agents have disregarded those conditions, it will not do away with the obligation of the bonds unless the holder was *aware of it*, in which case he is not a *bona fide* holder. (Commissioners of Knox County v. Aspinwall, 21 How. 545; Mercer Co. v. Hackett, 1 Wal. 93; Meyer v. City of Muscatine, 1 Wal. 393; Turquand v. Royal Brit. Bank, 5 El. & Bl. (85 E. C. L.) 259; S. C. 6 El. & Bl. (88 E. C. L.) 331.)

In respect to the *mode of constituting agents* of corporations, the common law, as understood in England, requires that it should, for the most part, be *by deed, under the common seal*; but even in England the rigor of that doctrine is much abated (Ang. & A. Corp. (10th ed.) §§ 224, 235 & seq.; 2 Kent's Com. (12th ed.) 288-291; Id. 291, n's (c) and (1.)), and, in the United States the doctrine is discarded. The corporation may in this country express its assent to the appointment of agents, not only under the corporate seal, but by a *vote of the corporation* in lawful meeting assembled, and entered upon the corporate records; by a *vote of the directors*, entered on their minutes; by the corporate authorities having *recognized similar previous acts* of the supposed agents; or by a *subsequent recognition* of the agent's authority, either by an *express ratification*, or impliedly, by *taking the benefit* of the agent's doings. (Bank of Col-

umbia v. Patterson, 7 Cr. 305; Fleckner v. Bank U. S. 8 Wheat. 357; Osborne, &c. v. Bank of U. S. 9 Wheat. 738; Dunn v. Rector, &c. 14 Johns. 118; Legrand v. H. Sidney Col. 5 Munf. 324; Burr v. McDonald, 3 Grat. 235 '6.)

The authority to *make a deed* even, may be conferred by a corporation on its agent, by *vote of the corporators*, notwithstanding the general rule applicable to *natural persons* requires that authority to execute a *sealed instrument* shall be *under seal*; for corporations are incapable of any *personal act*, and must, in the first instance, direct and assent *by vote*, which may as well authorize the seal to be affixed to the instrument itself as to the power directing and allowing it to be executed. (Burr v. McDonald, 3 Grat. 235-'6.) But let it be observed, that the seal to be employed is always to purport to be the *seal of the corporate body*,—that is, the seal adopted by it,—and not the seal of the agent. (Ang. & A. Corp. (10th ed.) § 226; Jackson v. Walsh, 3 Johns. (N. Y.) 225; Clark v. Benton Manufg Co. 15 Wend. (N. Y.) 256; Randall v. Van Vechten, 19 Johns. 65; Bank of Columbia v. Patterson, 7 Cr. 304; Dubois v. Del. & Hud. Can. Co. 4 Wend. 285.)

The proof of the appointment of an agent is usually the records of the corporation, produced from their proper custodian, who is commonly the secretary; and where the corporation is the adverse party, if notice be given to produce its records, and they are not produced accordingly, extrinsic testimony may be brought forward to show their contents, or to show that the agent *acted publicly* as such, or that the corporation knowingly enjoyed the benefit of the transaction, or otherwise ratified it, &c. (Bank of U. States v. Dandridge, 12 Wheat. 83; Dunn v. Rector, &c. 14 Johns. (N. Y.) 118; Ang. & A. Corp. (10th ed.) §§ 238, 384.)

When agents or officers of corporations are required to give bond with sureties, it is generally *directory* only, so that, unless the charter or some general statute otherwise provide, the agent or officer is competent to act, although he has given no bond, and the corporation is responsible for his conduct. (Bank of U. S. v. Dandridge, 12 Wheat. 64; U. States v. Van Zandt, 21 Wheat. 184; Peppin v. Cooper, 2 B. & Ald. (4 E. C. L.) 436-'7.)

Officers of corporations ought of course to be elected as the charter, or the general law, prescribes, or else the election is voidable; but still, if one comes in under *color of right*, he is a *de facto* officer, and his acts and contracts as such will bind the corporation though he be *in fact ineligible*, or although there were at the time no vacancy, there being in fact no officer *de jure* in place.

Nay, although never elected at all, yet if the corporation suffer him to act publicly as such, so that he *acquires the reputation* of being the officer he assumes to be, his acts as such are obligatory upon the body. (O'Brian v. Knivan, 3 Cro. (Jac.) 552; Harris v. Jays, 2 Cro. (Eliz.) 699; Baird v. Bank of Washington, 11 Serg. & R. 411; King v. Bedford Level, 6 East, 368; Parker v. Kett, 1 Ld. Raym. 600; Burr v. McDonald, 3 Grat. 235, &c.; U. S. Bank v. Dandridge, 12 Wheat. 70; Minor v. Mechanics Bank, 1 Pet. 46, 70.)

The *duration of an agency* or of an office depends, for the most part, on the terms of the appointment, or of the charter; and an *agency* is as much liable to be revoked as in the case of a natural person, save, as in case of a natural person, where the power is *coupled with an interest*, or was given for a *valuable consideration*. (2 Kent's Com. 644; 1 Pars. Cont. 61-'2; Hunt v. Rousmanier, 8 Wheat. 201; Clayton v. Fawcett's Adm'r, 2 Leigh, 23; Huston v. Cantril, 11 Leigh, 173; Bac. Abr. Authority, (E.); *Ante*, pp. 245-'6, &c.)

The *mode of contracting* by officers and agents must conform to the charter, or to the commission, and if they are silent, must pursue the methods used by agents generally, which has already been explained in the chapter of *Master and Servant*. (*Ante*, pp. 231-'2. See Head v. Prov. Ins. Co. 2 Cr. 166, &c.; Ducarry v. Gills, 4 Car. & P. (19 E. C. L.) 121; N. E. Mar. Ins. Co. v. D'Wolf, 8 Pick. (Mass.) 56; Mech. Bank v. Bank of Columbia, 5 Wheat. 326; Bank of N. Lib. v. Cresson, 12 Serg. & R. (Penn.) 260; Fleckner, v. Bank of U. S. 8 Wheat. 338.)

The *time within which* certain acts shall be done by officers and agents is sometimes prescribed, but it is *merely directory* in general, and the act may, for the most part, be validly done *after the time named*. (Atto. Gen. v. Scott, 1 Ves. Sr. 415.)

The ordinary proof of the agent's doings varies according as the agent is a *constituted board*, or is composed of *one or more individuals*. In the former case a minute is commonly made and recorded of what they do; and that is the best evidence of their action, if such a minute was made; but if not, their action, and in all cases the action of individual agents, must be proved by the most satisfactory legal evidence that presents itself, as in the other affairs of life. (U. S. Bank v. Dandridge, 12 Wheat. 75; U. S. v. Kirkpatrick, 9 Wheat. 720; Russell v. McLellan, 14 Pick. 63; U. S. v. Van Zandt, 11 Wheat. 184.) But although there be in the regulations of the corporate body directions for authenticating the acts of its agents,

those directions are between the body and the agent, and are not, in general, available between the corporate body and a stranger. (U. S. Bank v. Dandridge, 12 Wheat. 75; Bank of N. Liberties v. Cresson, 12 S. & R. (Pa.) 306; Russell v. McLellan, 14 Pick. (Mass.) 63; Middlesex Husbandmen v. Davis, 3 Met. (Mass.) 133; Chester Glass Co. v. Dewey, 16 Mass. 102.)

As to the mode in which the agent of a corporation ought to frame the contract which he makes as such, the same principles are applicable as in other cases of agency, for which reference is made to the chapter of *Master and Servant*. (*Ante*, p. 231 '2.) See Hartshorn v. Whittles, 3 Mumf. 357; Jones v. Carter, 4 H. & M. 184; McWilliams v. Willis, 1 Wash. 202; Martin v. Flowers, 8 Leigh, 158; Earley v. Wilkinson, 9 Grat. 68; Stinchcomb v. Marsh, 15 Grat. 209 & seq.; 3 Rob. Pr. (2d ed.) 63, &c.; 1 Am. L. C. 604.)

As corporations are only bound by what their agents do *within the scope of their authority* (Mech. Bank v. Bank of Columbia, 5 Wheat. 337; Clark v. City of Washington, 12 Wheat. 40; Bank of U. S. v. Dandridge, *Id.* 83), it becomes an interesting question what the *precise extent* of the authority is, and especially as to the regular officers of the association. It is important, therefore, to note that the president is not *ex officio* the agent of a corporate body to sell property which the body directs to be sold, and therefore, unless he is appointed to sell, his representations touching the property are not binding on the corporation (Crump v. U. S. Min. Co. 7 Grat. 352); neither has he *ex officio* power to affix the seal of the corporation to a writing (Burr v. McDonald, 3 Grat. 235 '6; Clarke v. Imp. Gaslight Co., 4 B. & Ad. (24 E. C. L.) 315), nor to draw checks for the corporation moneys deposited in bank (Fulton Bank v. N. Y. & Sharon Can. Co., 4 Pai. Ch. R. (N. Y.) 127; Ang. & A. Corp. (10th ed.) §§ 223, 298-302); nor has the president or cashier of a bank power *ex officio* to transfer or mortgage the property or general assets of the corporation, or to charge such assets with any special responsibility, nor to discharge its debtors from their engagements. (Hodge v. First Nat. Bank, 22 Grat. 58, 61; Bank of U. S. v. Dunn, 6 Pet. 51; U. S. v. City Bank, 21 How. 356.) When the charter allows the capital stock of a corporation to be increased at the pleasure of the corporation, the directors are not empowered to do it, notwithstanding the charter vests in them "all the corporate powers of the corporation"; for that phrase relates only to the ordinary business of the body, not to organic changes. (Railway Co. v. Allerton, 18 Wal. 233, 234-5.)

On the other hand, the president of a railroad company has *ex officio* power to contract for labor for the company, in the absence of any contrary provision in the charter or by-laws. (Richm., Fred. & Pot. R. R. Co. v. Snead & al. 19 Grat. 354.)

The authority *ex officio* of the cashier of a bank is not fully defined. See Fleckner v. Bank of U. S. 8 Wheat. 338, 360-'61; Merchants Bank v. State Bank, 10 Wal. 604, 644 & seq.; Ang. & A. Corp. (10th ed.) §§ 299-302; Morse on Banks, &c. 137.

In respect to the extent of the power of boards of bank-directors, which is very comprehensive, see Bank of U. S. v. Dana, 6 Pet. 51; Bank of Metropolis v. Jones, 8 Pet. 16; Fleckner v. U. S. Bank, 8 Wheat. 338, 355; Ang. & A. Corp. (10th ed.) § 299.

Notice to an agent, or to one of several co-agents, whilst engaged in the *transactions of the agency*, is notice to the corporation, but not if the notice were received whilst not so engaged. And when notice is thus brought home to the principal, it affects the corporation continuously, although its affairs afterwards fall into the hands of different persons wholly unacquainted with the fact in question. (Mech. Bank v. Seton, 1 Pet. 299; Ang. & A. Corp. (10th ed.) § 308; Richmond Enquirer Co. v. Robinson & als. 24 Grat. 553-'4.) So a corporation must abide the consequences of its agent's negligence, and therefore, if by reason of the default and neglect of such agent, it fails to avail itself of a defence at law which it might have successfully asserted, it is not competent to a court of equity to relieve against the judgment thus obtained. (Earl of Oxford's case, 2 Wh. & Tud. L. C. (Pt. II.), 75 & seq., 97 & seq.; Mar. Ins. Co. v. Hodgson, 7 Cr. 332; Slack v. Wood, 9 Grat. 40; Richmond Enq. Co. v. Robinson & als. 24 Grat. 552, &c.)

The rules of law governing the relation of master and servant, or principal and agent, are as applicable to corporations as to natural persons. Hence, a corporation is liable for the negligence, unskilfulness, ignorance, or wrong-doing generally (not wanton or malicious), of its agents, on the same principles, and to a like extent, as a natural person is. (Shearm. & Redf. on Negligence, §§ 120, 135, 137; Ang. & A. Corp. (10th ed.) §§ 309, 310, 386 & seq.; De Voss v. City of Richmond, 18 Grat. 338; City of Petersburg v. Applegarth, 28 Grat. 343.) The same doctrine prevails also in respect to *municipal* corporations, except in the exercise of their political, discretionary, and legislative authority, that is, in their governmental functions, in which case they are not answerable for any misconduct, negligence or omissions of the

experts or agents employed by them, farther than as they may be charged by the terms of their charters, or by the statute law. (*Ante*, p. 251; *City of Richmond v. Long*, 17 Grat. 379; 2 Dill. Mun. Corp. § 761; *City of Petersburg v. Applegarth*, 28 Grat. 343-4.)

In respect to the effect of an *official bond*, given by the officer of a corporation, and the extent of the obligation thereby created, see *Minor v. Mech.* B'k. 1 Pet. 46; *Allison v. Farmers Bank*, 6 Rand. 204; *McGill & al. v. U. S. Bank*, 12 Wheat. 511; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Jones v. U. States*, 18 Wal. 662; *S. Savors v. Bostock*, 2 Bos. & Pul. N. R. 174; *Hassell v. Long*, 2 M. & S. 363; *Peppin v. Cooper*, 2 B. & Ald. (4 E. C. L.) 431; *Com'th v. Holmes*, 25 Grat. 771; *R. & P. R. R. Co. v. Kasey*, 30 Grat. 218; *Ang. & A. Corp.* (10th ed.) §§ 319 & seq.)

4^d. Power to Take, Hold, Transmit in Succession, and Alienate Property, as Natural Persons may.

It is incident to every corporation aggregate, at common law, to take, hold, transmit in succession, and to alienate property, *real and personal*; and this power constitutes one great element of the convenience and usefulness of these bodies politic (1 Bl. Com. 468); but experience having manifested the mischief which might ensue if the liberty of acquiring *lands* by corporations were unrestricted, the common law itself, imitating therein the Roman law, did not permit them to become purchasers of lands indefinitely, but only by the royal license. This jealousy was especially directed towards *religious* corporations, whose powerful influence over the consciences of men, particularly on their death beds, easily prevailed upon them to purchase a supposed immunity for sin by benefactions to the church. Accordingly, the common law being frequently evaded, a series of statutes, in England known as the statutes of *Mortmain*, commencing with *Magna Charta* (9 Hen. III. c. 26, A. D. 1225), and reaching down even to 27 Viet. c. 13 (A. D. 1864), forbade, first, *religious houses*, and then any *religious person* (*i. e.*, monk *professed* or other ecclesiastic), and *any corporation* to *purchase or hold lands* by any device whatsoever, without license from the Crown, under penalty of forfeiting them to the king. Singularly ingenious and artful were the means employed by the ecclesiastics to evade these statutes; but as often as they succeeded, parliament promptly supplied the defect; and although the contest was a long one, being kept up with vigor by the churchmen until A. D. 1392, it terminated at length in the triumphant maintenance of the *mortmain policy* through the statutes (after 9 Hen. III.) of 7 Edw. I. c. 2 (A. D. 1279); 13 Edw. I. c. 32 (A. D. 1285); and 15 Rich. II. c. 5 (A. D. 1370). See 1 Bl. Com. 479; Bac.

Abr. Charitable Uses (A.) ; Wms. Real Prop. 66 & seq. ; 2 Min. Insts. 517 & seq.

In Virginia we have a corresponding and hardly less rigorous restriction upon corporations in respect to lands, it being enacted (V. C. 1873, ch. 56, § 2; V. C. 1887, ch. 46, § 1070), that "no incorporated company shall hold *any more real estate* than is proper for the purposes for which it is incorporated." (Rivanna Nav. Co. v. Dawsons, 3 Grat. 21.) It is further declared that "no company shall employ its capital, money, or effects, or otherwise engage in transactions or business not proper for those purposes"; and that "one company shall not subscribe to the stock of another, unless it be specially allowed by law"; yet not so as to "prevent a company from receiving stocks or other property in satisfaction of any judgment, order, or decree, or as collateral security for, or in payment of, any debt, or from purchasing stocks or other property at any sale made for its benefit." (V. C. 1873, ch. 56, § 3; V. C. 1887, ch. 46, § 1071.) And as the statute of wills with us (V. C. 1873, ch. 118, § 2; V. C. 1887, ch. 112, § 2512) imposes no restrictions applicable to corporations, they may take by devise or bequest, subject to the foregoing qualifications, like natural persons.

Unfortunately our statute does not expressly declare, as the English statutes of *mortmain* do, what shall be the *consequences* of a corporation's acquiring more lands than it is permitted to hold. The better opinion, *upon principle*, seems to be that, as the corporation grantee *cannot hold* the surplus contrary to law, and as the grantor *cannot have it back* against his deed, it *must be forfeited* to the commonwealth, as where an alien illegally purchases lands. (V. C. 1873, ch. 109, § 3; V. C. 1887, ch. 105, § 2374; 2 Min. Insts. 523.) But see 1 Lom. Dig. 13, 14; Banks v. Poiteaux, 3 Rand. 142; Riv. Nav. Co. v. Dawsons, 3 Grat. 23, and cases cited.)

If the English statutes of *mortmain* were ever in force in Virginia (which may be doubted, seeing that they are said to be *political* in their character, and, therefore, *local to England* (Atto. Gen. v. Stewart, 2 Meriv. 143)), they were at all events repealed by the act of 1789 (13 Hen. Stats. 23-4), which repealed *all British statutes not re-enacted*.

With the qualifications created by the statute above cited (V. C. 1873, ch. 56, §§ 2, 3; V. C. 1887, ch. 46, §§ 1070, 1071), or by its charter, a corporation *aggregate* may acquire and hold property of any kind, without any other limitation. Thus, a bequest to a corporation of its own stock is valid (Riv. Nav. Co. v. Dawson, 3 Grat. 20); and in order to guard against abuse it is provided (V. C. 1873, ch. 56, § 3; V. C. 1887, ch. 46, § 1071) that, while a com-

pany holds shares of its own stock, no vote shall be given thereon, which, indeed, is believed to be the common law. (*Ex parte* Holmes, 5 Cow. (N. Y.) 426; *Campbell v. Poultney*, 6 Gill & J. (Md.) 94; *Ex parte* Desdoity, 1 Wend. (N. Y.) 98; Ang. & A. Corp. (10th ed.) § 159.) But a corporation sole cannot take a chattel in *succession*, that is, to the corporation and its *successors*, no more than can the heirs where a chattel is conveyed to a man and *his heirs*. In both instances it goes to the *executors or administrators* of the grantee. (1 Th. Co. Lit. 192-'3, & n. (K).)

It seems, however, to be a true proposition, that a corporation, except where it is otherwise expressly or by clear implication, provided in its charter or by some statute, stands upon the same footing as individuals, in the use of its property, the exercise of its powers, and the transaction of its business, and is subject to the same control under the police powers of the State, or of a municipal corporation. (*Richmond, F. & P. R. R. Co. v. Richmond*, 26 Gratt. 83, 95 & seq.)

It is agreed that corporations cannot exercise their powers for purposes foreign to their creation. A bank of discount and deposit cannot engage in manufactures or agriculture; nor can a road or canal company speculate in stocks or merchandise. A corporation, however, is always competent to use, for the accomplishment of its proper end, any means appropriate thereto, and thus may incidentally have transactions on its hands, in securing its debts, etc., which are in themselves very foreign to its institution. (*Riv. Nav. Co. v. Dawsons*, 3 Gratt. 21.) It is, moreover, often a question of nicety, whether a given transaction is within the direct scope of the proper purposes of the corporation or not; and upon this point the construction ought to be *liberal*. Unless the transaction is *clearly ultra vires*, the legality must be sustained. (*Banks v. Poiteaux*, 3 Rand. 136; Ang. & A. Corp. (10th ed.) § 256.)

A corporation is not confined in its transactions, as it is in its *quasi habitation*, to the sovereignty which created it. It may make contracts, and acquire and hold property, real and personal, abroad as well as at home, wherever its charter permits, and the local law (the *lex loci contractus*, or the *lex loci rei sitæ*) does not forbid. (*Slaughter's Case*, 13 Gratt. 767.) Thus, a corporation chartered by the State of New York, whose charter contemplated the acquisition and ownership of coal lands in Pennsylvania, having acquired such lands with the assent, express or implied, of the latter State, the purchase was held to be valid. It is for the local sovereign to prescribe the terms upon which the presence of the corporate body, by its agents, and the conducting of its operations in a foreign country, shall be

permitted; but by the consent, express or implied, of the local government, it may transact there any business not *ultra vires*, that is, not beyond its chartered power or capacity. (*Bank of Augusta v. Earle*, 13 Pet. 590; *Runyan v. Coster*, 14 Pet. 129 & seq.; *Tombigbee Railroad Co. v. Kneeland*, 4 How. 16; *Lafayette Ins. Co. v. French*, 18 How. 405; *St. Louis v. Ferry Co.* 11 Wal. 429; *Bank of Marietta v. Pindall*, 2 Rand. 465; *Taylor's Adm'r v. Bank of Alexandria*, 5 Leigh, 475; *Slaughter's case*, 13 Grat. 767; *Silver Lake Bank v. North*, 4 Johns. C. R. 372.)

Blackstone states (2 Bl. Com. 477), upon the authority of several of the older writers, that a corporation cannot be seised of lands *to the use of another*, that is, cannot be a trustee; for, says he, "such kind of confidence is foreign to the end of its institution." And, indeed, if the limitation be attended to, the principle may be still admitted as true. A corporation cannot be a trustee for purposes *foreign to the end of its institution*; but *within those ends* it may be; and if the trust be such as it is not fitting to charge the corporation with, equity, upon its maxim of never suffering a trust to fail for want of a trustee, will devolve the duty upon some competent person. As a corporation, according to the modern construction, may be *seised to a use* not foreign to its purposes, there seems to be no doubt that it is capable of conveying lands by *bargain and sale*. (2 Kent's Com. 279; *Ang. & A. Corp.* (10th ed.) §§ 166 & seq.; *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422; *Phillips Acad. v. King*, 12 Mass. 546; *Greene v. Rutherford*, 1 Ves. Sr. 462, 468, 470, 475; *Sonley v. Clockmaker's Co.*, 1 Bro. C. C. 81; *Vidal v. Girard's Ex'ors*, 2 How. 128. But see 2 Lom. Dig. 187.)

In consequence of this more reasonable modern construction, corporations may be, from their permanence, very useful as trustees, to conduct trusts of long continuance, and are sometimes created for that express purpose. (*Ang. & A. Corp.* (10th ed.) §§ 166 and seq.; *Trustees of Phillips Acad. v. King*, 12 Mass. 546; 2 Kent's Com. 280.)

The *modes of conveyance* to corporations are essentially the same as in the case of *natural persons* (2 Lom. Dig. 114, & n. (8), 187); but there is at common law a diversity in the terms proper to be employed. In conveyances in *fee simple*, to corporations *sole*, the word *successors* is as indispensable as the word *heirs* in conveyances to natural persons. The same word, *successors*, is, at common law, usual and expedient in conveyances in fee simple to corporations *aggregate*; but it is not so indispensable as in case of a corporation *sole*; for albeit a grant without that word passes in strictness only an estate *for life*, yet as corporations *aggregate* have a capacity for uninterrupted per-

petual succession, an estate for the life of the corporation is, or may be, equivalent to a fee-simple, and therefore the law allows it to be one. (2 Bl. Com. 109; 1 Th. Co. Lit. 191, 501; Overseers of Poor v. Sears, 22 Pick. (Mass.) 122.) In Virginia this distinction is superfluous; every estate granted or devised being a fee-simple, or at least as much as the grantor or devisor has, *unless a less estate be limited*. (V. C. 1873, ch. 112, § 8; V. C. 1887, ch. 107, § 2420.)

Corporations have always had power to acquire *chattels* by will; but when, in England, the law first permitted *lands* to be devised, or willed, the statutes allowing it (32 Hen. VIII., c. 1, explained by 34 Hen. VIII., c. 5, A. D. 1541), specially excepted *bodies corporate*, which were declared incapable of being devisees. (2 Bl. Com. 375.) But this exception, though still retained in some of these States (2 Kent's Com. 282-3, &c.; Ang. & A. Corp. (10th ed.) §§ 177, &c.), has been excluded from the Virginia statute of wills (V. C. 1873, ch. 118, § 2; V. C. 1887, ch. 112, § 2512.) In England, however, by the statute 43 Eliz. c. 4, known as the statute of *charitable uses*, and in force in several of these States, although not in Virginia, a corporation is enabled to be a *trustee for charitable uses*, even such as are so vague and uncertain as would certainly avoid them if they were *not charitable*. (2 Kent's Com. 285, & n. (b).)

Whether shares in a joint-stock corporation are *real* or *personal* property, admits, it seems, of doubt at common law, where the property of the corporation consists of *lands* (Harrison v. Harrison, 2 Atk. 337; Drybutter v. Bartholomew, 2 P. Wms. 127; Buckridge v. Ingram, 2 Ves. Jr., 663-4; House v. Chapman, 4 Ves. 542; Finch v. Squire, 10 Ves. 44; Portmore v. Bunn, 1 B. & Cr. (8 E. C. L.) 694.) The better opinion, however, seems to be that shares (being only a right to take a due proportion of the net profits of the operations of the corporation, and when it terminates, of its assets that remain) are always *personal property*, in the absence of any special provision to the contrary in the charter or by general legislation. (*Ante*, p. 531; Ang. & A. Corp. (10th ed.) §§ 557 & seq.; 1 Redf. Railways (5th ed.) 119-121, and cases cited; Bradley v. Holdsworth, 3 M. & W. 422; Bligh v. Brant, 240, and Coll. 268, 294.) But in Virginia all doubt is removed by statute, which declares them always *personal estate*. (V. C. 1873, ch. 57, § 21; V. C. 1887, ch. 47, § 1125.) The transfer of shares, and the transmission after the owner's death, is thus rendered more convenient, and the property is assimilated to such as is used in trade by partnerships, which, whatever its nature, is regarded for the purposes of the partnership trade as having the *quality of personalty*.

(Stor. Confl. L., §§ 383, &c.; Ang. & A. Corp. (10th ed.) § 557.) It will be observed, however, that this is a question only as to the *shares in the corporation*. In respect to the corporation itself, real property is treated according to its nature, being conveyed to and by such corporate bodies with the same solemnities as if they were natural persons. (*Barksdale, &c. v. Finney & als.* 14 Grat. 357.)

Gifts and grants to corporations must always be by their *true name*, of which enough has been said. (*Ante*, pp. 559 to 562.)

In general, corporations have the same power as natural persons to dispose of their property, and do it by the same modes; but their power may be modified by charter. (*Barksdale v. Finney*, 14 Grat. 338.) There is, however, a notable diversity between natural persons and corporations, in connection with restraints upon free alienation. In the case of natural persons, a condition *not to aliene* a fee-simple estate is for the most part void, as *repugnant* to the nature of the estate granted, and adverse to public policy; whilst a similar condition annexed to a grant in fee-simple to a corporation is readily admitted, because, it is said, a corporation is a political body, and can properly acquire land for *its own use only*, and not for speculative purposes, or to sell again; and so a condition not to aliene tends merely to compel the observance of its legal obligations, and to maintain it within the sphere of its duty. (2 Min. Insts. 76, and cases there cited.)

At common law, upon the *dissolution of a corporation*, its real estate then remaining undisposed of, *reverts to the grantor*, whilst the *personal property goes to the Crown*, or with us, to the *commonwealth*, the debts due to and from the corporation meanwhile being extinguished. Not only does its dissolution put an end to all legal or equitable proceedings, by or against it, which are yet in progress, but even upon judgments and decrees already obtained no execution can issue; and if any be issued, the court will quash it upon proof of the extinction of the corporation. (1 Bl. Com. 484; *Rider v. Union Factory*, 7 Leigh, 54; *May v. State Bank of N. C.* 2 Rob. 56.) But see *Post*, 659.

In this state of the law, when a corporation is aware of its approaching end, it is usual to convey and assign all its property and debts to trustees, in trust to collect the debts, sell the property, pay the debts due from it, and to distribute the residue amongst the corporators, according to their respective interests. (*Bank of Alexandria v. Patton*, 1 Rob. 524; *May v. State Bank of N. C.* 2 Rob. 56.) This device is now rendered needless in Virginia by a wholesome statute (V. C. 1873, ch. 56, § 31; V. C. 1887,

ch. 46, § 1103), which declares that, when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and *debts due to it*, shall be subject to the payment of debts due by it, and then to distribution among the members, according to their respective interests; and such corporation *may sue and be sued as before*, for the purpose of collecting debts due to it, prosecuting rights under *previous contracts* with it, and enforcing its liabilities, and distributing the proceeds of its works, property and debts among those entitled thereto. And the statute enacts that notice to, or process against, such corporation to answer in any suit or civil proceeding shall be sufficiently served by publication thereof once a week for four successive weeks in some newspaper published in the county or corporation wherein the suit or the proceeding is, or if none, in any newspaper in the State.

5^d. Power to make By-Laws.

The power to make by-laws, not inconsistent with the laws of the land, nor with the charter, nor unreasonable in themselves, belongs inseparably to every corporation as soon as it is created. (1 Th. Co. Lit. 184, n. (C.); Bac. Abr. Corp. (D.); Id. By-Laws; 1 Bl. Com. 476.) And although the power is almost always conferred expressly by the charter, and in Virginia by general law (V. C. 1873, ch. 56, § 1; V. C. 1887, ch. 46, § 1068), the express grant imports no more than is implied, although it may circumscribe the latter. (Morris v. Staps, Hob. 211 a; Child v. Hudson's Bay Co. 2 P. Wms. 207; Rex v. Spencer, 3 Burr. 1837.) Eleemosynary corporations are said to be an exception to this general doctrine, and to have no further power to make by-laws than as authorized by the charter; and that because such corporations are creatures of the founder's bounty, and in the nature of *grants*, which are irrevocable, and whose terms are unalterable, either by third persons or by the grantor himself, unless power to revoke or alter be reserved—a reason which is by no means satisfactory, and tends to throw doubt upon the doctrine. (St. John's Col. v. Todington, 1 Burr. 201; Ang & A. Corp. (10th ed.) §§ 325, 330.)

As to the precise mode of enacting by-laws, and the mode of proving them, see 1 Th. Co. Lit. 184, n. (C.); Case of Corporations, 4 Co. 77 b; Bac. Abr. By-Laws; Ang. & A. Corp. (10th ed.) §§ 325-368; Id. § 284.

To whomsoever the power to make by-laws for a corporation is confided, whether to the body at large or to a select portion, it *is a trust* to be exercised with *discretion*, and therefore, by-laws which are vexatious, oppressive and unequal, or manifestly detrimental to the corporation or to

the public, *are void*. (Mitchel v. Reynolds, 1 P. Wms. 184; Gunmaker's Co. v. Fell, Willes, 388, and cases cited in note; Clark's Case, 5 Co. 64 a, note; 1 Th. Co. Lit. 184, n. (C).) Thus, a by-law of a bank, that all errors in payment made or received, must be corrected at the time, and not afterwards, is of no avail to prevent the enforcement of the correction of a mistake afterwards, when it is found. (Farm. & Mech. Bank v. Smith, 19 Johns. (N. Y.) 115; Gallatin v. Bradford, 1 Bibb. (Ky.) 209.) So a by-law empowering share-holders, on payment of a specified percentage of their stock, to forfeit it and relieve themselves of the obligation, is void as to creditors. (Bac. Abr. By-Laws, (F.); Slee v. Bloom, 19 Johns. 456.) Nay, if the trustees, or other proper agents for that purpose, of a corporation, neglect to collect of the share-holders what is unpaid of their subscriptions, so as to enable the company to pay its debts, any creditor, by a bill in chancery, may compel such agents to enforce contribution from the stock-holders, according to the shares taken by them respectively, or, what amounts to the same thing, will itself make and enforce an assessment for the purpose of paying the debts. (Briggs v. Penniman, 8 Cow. (N. Y.) 387; Slee v. Bloom, 19 Johns. (N. Y.) 474.) And a by-law authorizing the directors to *alter the by-laws* cannot be construed to empower them to disregard or alter a by-law which imposes a limitation upon their own powers. (Stevens v. Davison, 18 Grat. 819.) See Ang. & A. Corp. (10th ed.) §§ 347, 357; Vintner's Co. v. Passey, 1 Burr. 239; Mayor, &c. Workingham v. Johnson, Cas. T. Hardw. 284; Poulterers' Co. v. Phillips, 6 Bingh. N. C. (37 E. C. L.) 314.

The by-laws of a corporation generally provide for the transfer of shares from one person to another; but such provisions are designed only for the protection of the corporation and its officers, to show who may vote, and to whom dividends are to be paid, etc.; and, therefore, although the company's rules be not complied with in making the transfer, yet the transfer passes to the purchaser the *equitable title*; not, indeed, so as to entitle him to vote, or to receive dividends, or so as to prejudice the company's lien upon the shares transferred; but so as that a court of equity will compel the company, if it has no sufficient reason to the contrary (and giving due protection to its rights), to allow a formal transfer on its books. (Union Bank v. Laird, 2 Wheat. 390; Black v. Zacharie & Co. 3 How. 513, and cases there cited.)

A corporation has not, by the common law, a lien upon its shareholder's stock for what he may owe the company, but as such a provision is very expedient in *trading*, and especially in *banking companies*, it is commonly conferred

by the charter; and if it can be created at all merely by a by-law, without authority from the charter, it is at all events to be rigorously construed, both as to the debts included in the lien, and as to the mode of insisting thereon. (*Child v. Hudson's Bay Co.* 2 P. Wms. 207; *Ang. & A. Corp.* (10th ed.) §§ 355, 356.) By the effect of the act of congress of June, 1864, touching the system of national banks, such lien is prohibited, even though declared by a by-law of a bank. (13 U. S. Stats. 102, § 35; *Rev. Stats. U. S.* § 5201; *Bank v. Lanier*, 11 Wal. 374, &c.; *Bullard v. Bank*, 18 Wal. 594, &c.)

The power to make by-laws supposes, of course, a power to enforce them by penalties in the nature of *fines of fixed amount*, and not left to be determined even within a *maximum*, by the governing part of the body, for that would be, in fact, to allow a party aggrieved to *assess* his own damages. But, except under special provisions in the charter, a corporation cannot inflict, as a penalty, for breach of its by-laws, disfranchisement, a denial of the share of the profits, imprisonment, or forfeiture of the member's goods, or even *of his shares*; and when, *by charter*, non-payment of instalments is visited by forfeiture or sale of the shares, it is, according to the better opinion, a cumulative remedy, which does not preclude an action for the arrears remaining due after crediting the proceeds of the sales of stock. (*Herkimer Man. & Hyd. Co. v. Small*, 21 Wend. (N. Y.) 273; *Gratz v. Redd*, 4 B. Monroe, (Ky.) 193 '94; 2 Lev. 201; 2 M. & S. 60; *Grays v. Turnpike Co.* 4 Rand. 578; *Ang. & A. Corp.* (10th ed.) §§ 360 & seq.; V. C. 1873, ch. 57, §§ 23 to 25; V. C. 1887, ch. 47, §§ 1127 to 1129.)

Any penalty ordained by a by-law may be generally recovered by an action of debt or assumpsit (*Bac. Abr. By-Laws* (E.); *Chamberlain of London Case*, 5 Co. 63 b; *Clark's Case*, Id. 64 a; *Surgeons v. Pelson*, 2 Lev. 252; *Wooley v. Idle*, 4 Burr. 1952); and it seems, also, *by distress*,—but by distress to be *kept as a pledge merely*, and not by distress and sale, unless authorized by statute or charter. (*Clark's Case*, 5 Co. 64 a; *Clerk v. Tucket & al.* 3 Lev. 282; *Adley v. Reeves*, 2 M. & S. 60.)

A penalty given in general terms is for the use of the corporation, but the by-law may direct that *when recovered* in the company's name, it may be assigned to whom it will; and in general the suit is to be in the name of the corporation. (*Ang. & A. Corp.* (10th ed.) §§ 364, 365.)

6^d. Power to Sue and to be Sued.

The power of a corporation to sue and be sued requires us to have regard to, (1). The doctrine as to the capacity of corporations to sue and to be sued; and (2). The mode

of proceeding in suits by or against corporations. (1 Bl. Com. 475; Bac. Abr. Corp. (E.) 2; Ang. & A. Corp. (10th ed.) §§ 369 & seq.; Id. §§ 379 & seq.)

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- 1^e. The Doctrine as to the Capacity of Corporations to Sue and to be Sued.

The capacity to sue and to be sued is inherent in all corporations, and relates to almost every conceivable judicial proceeding, *regular or summary*;

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- 1^f. The Doctrine as to the Capacity of Corporations to Sue.

Any corporation may institute an attachment, or any appropriate action, *on any contract* into which it is capable of entering; *for any tort* (that is, any injury done to it other than by breach of contract), which it can suffer; and *for land*. (Ang & A. Corp. (10th ed.) §§ 369 & seq.)

Hence, there has never been any doubt, even in England, that a corporation may sue in *assumpsit*, which is the appropriate action to recover damages for a breach of contract not under seal; for although in that country needless question has been made as to the power of a corporation to bind itself otherwise than by its corporate seal, yet it has always been admitted (rather illogically) that it may *receive a promise* made to it, whether under the opposing party's seal or its own, or not. (Barber Surgeons v. Pelson, 2 Lev. 252; Mayor, &c. v. Gorry, Id. 174; Dean, &c. v. Pierce, 1 Campb. 467; Randall v. Van Vechten, 19 Johns. (N. Y.) 60; Bank of Metropolis v. Guttschlick, 14 Pet. 29.)

As a corporation *with a head* (e. g., the *mayor*, in case of the *mayor and commonalty* of a town), is incomplete without it, it cannot sue or be sued without joining the head (Bac. Abr. Corp. (E.) 2). And where a bond or other *sealed promise* is made to an officer of the corporation *for its use*, the action must, at common law, be brought in the officer's name, and not in that of the corporation. (Offly v. Warde, 1 Lev. 234; Gilby v. Copley, 3 Id. 138, &c.; Scholey v. Mearns, 7 East. 148; Schack v. Anthony, 1 M. & S. 575; Pigott v. Thompson, 3 Bos. & P. 148; Ross v. Milne & ux. 12 Leigh, 203; Clarkson v. Doddridge, 14 Grat. 44; 1 Chit. Pl. 3.) In Virginia, however, by statute, the suit may be in the corporate name, where the promise is *for its benefit*, although made to another person, and under seal. (V. C. 1873, ch. 112, § 2; V. C. 1887, ch. 107, § 2415.)

A *sole corporation*, having a *natural* as well as a *corporate* capacity, must always set forth in which capacity

the suit is brought; but an *aggregate* corporation has no other but a *corporate* character, and it is, therefore, needless expressly to aver that the cause of action accrued to it as a corporation. (Bac. Abr. Corp. (E.) 2.)

A corporation is not required to show in the declaration how it was incorporated, but on the *general issue* pleaded by the defendant, it must, at common law, *prove its corporate existence*; and that not only by proving its charter, but also its organization, in pursuance of the charter (Norris v. Staps, Hob. 211; Henriques v. Dutch W. India Co. 2 Ld. Raym. 1535; Bank of Auburn v. Weed, 19 Johns. (N. Y.) 302; Grays v. Turnpike Co. 4 Rand. 579; Jackson v. Bank of Marietta, 9 Leigh, 240; Rees v. Conococheague Bank, 5 Rand. 326; Taylor v. Bank of Alex'a, 5 Leigh, 471); but in Virginia it is provided by statute, that when plaintiffs or defendants sue or are sued as a corporation, it shall not be necessary to prove the fact of incorporation, unless with the pleading which puts the matter in issue, there be an *affidavit denying such incorporation*. (V. C. 1873, ch. 167, § 40; V. C. 1887, ch. 159, § 3280.)

As a foreign corporation may make any contract and engage in any transaction which is warranted by its charter, as well without as within the sovereignty which created it, provided only that it be not repugnant to the policy of the country where the transaction occurs, so in its corporate capacity it may maintain abroad, as well as at home, any action which may grow out of such business. By an universal international comity, the mere fact that the corporation *is a foreign one* does not affect its capacity to sue. This doctrine was first clearly stated in Henriques v. Dutch, W. India Co. 2 Ld. Raym. 1535, and has been very often reiterated in the United States, where the intimate relations of society and business between the several States render it peculiarly important. (Bank of Marietta v. Pindall, 2 Rand. 466; Rees v. Conococheague Bank, 5 Rand. 326; Taylor v. Bank of Alexandria, 5 Leigh, 471; Silver Lake Bank v. North, 4 Johns. C. R. 370; Bank of Augusta v. Earle, 13 Pet. 519, 588; Runyan v. Lessee, &c. 14 Pet. 129; Tombigbee R. R. Co. v. Kneeland, 4 How. 16; Lafayette Ins. Co. v. French, 18 How. 405; St. Louis v. Ferry Co. 11 Wal. 429.) It may be further remarked, that a corporation, originally *foreign*, may become by adoption *domestic*. Thus, the Balt. & O. R. R. Co., passing as it did through the territory of Virginia (now West Virginia), became by the terms of the act allowing the passage, essentially a Virginia corporation, and as such is liable to be sued here

on contracts made in this State, or on causes of action accruing here. (Balt. & O. R. R. Co. v. Gallahue, 12 Grat. 658; Balt. & O. R. R. Co. v. Wightman, 29 Grat. 431; Balt. & O. R. R. Co. v. Noell, 32 Grat. 396.)

In respect to the jurisdiction of the *United States courts* under that clause of the Federal constitution which gives cognizance to those courts of "controversies between citizens of different States," it is now well settled (contrary to the earlier adjudications—Hope Ins. Co. v. Boardman, 5 Cr. 57; Bank of U. S. v. Deveaux, Id. 84; Strawbridge v. Curtis, 3 Cr. 267; Bank of Vicksburg v. Slocumb, 14 Pet. 60), that although a corporation is not *a citizen* at all, yet under the clause in question it is to be *deemed a citizen* of the State *which created it*, and may, therefore, maintain a suit in the courts of the United States against a citizen of *any other State*. (Louisville R. R. Co. v. Letson, 2 How. 497, 555; Marshall v. Balt. & Ohio R. R. Co. 16 How. 314; Covington D. B. Co. v. Shepherd, 20 How. 232; O. & Miss. R. R. Co. v. Wheeler, 1 Black, 286; Ins. Co. v. Francis, 11 Wal. 216; Railroad Co. v. Harris, 12 Wal. 65; Railway Co. v. Whitton, 13 Wal. 283.)

2^d. Doctrine Touching a Corporation's Capacity to be Sued.

For whatever contract a corporation is competent to make or to violate, and for whatever *tort* it is competent to commit, it has the capacity to be sued. So also it may be sued for land which it withholds from the true owner. When the common law doctrine prevailed, that a corporation could only express its assent to a contract by its *common seal*, it was considered that it was not subject to an action of *assumpsit*, which is adapted only to recover damages for a breach of contract *not under seal*; but as it is now, and has long been admitted even in England, that it may make *some contracts* otherwise than under the corporate seal, it follows that the action of *assumpsit* will sometimes lie against it, namely: whenever the contract is not under seal. (1 Bl. Com. 475, & n. (5); London Dock Co. v. Sinnott, 8 El. & Bl. (92 E. C. L.) 350; Nicholson v. Bradfield Union, 1 Q. B. (Law Rep.) 620, 622, where the English cases are well marshalled.)

In the United States it is well settled, as we have seen, that a corporation may express its assent in nearly the same ways as a natural person, to any contract, and may be sued accordingly, namely:

- 1, Under its common corporate seal;
- 2, By vote of the corporators, in lawful meeting assembled, and entered on their records; or *perhaps* even though unwritten;

3, By vote of directors in lawful meeting, duly entered ; or *perhaps* though unwritten ;

4, By agents duly appointed, whose authority may be proved by any satisfactory evidence ;

5, By accepting, knowingly, the benefit of the contract, or otherwise *ratifying* it.

See *Legrand v. H. S. College*, 5 Munf. 324 ; *The Banks v. Poiteaux*, 3 Rand. 141 ; *Burr v. McDonald*, 3 Grat. 215 ; *Barksdale v. Finney*, 14 Grat. 338 ; *Bank of Columbia v. Patterson*, 7 Cr. 305 ; *Fleckner v. Bank of U. S.* 8 Wheat. 338 ; *Bank of U. S. v. Dandridge*, 12 Wheat. 68 ; *Eureka Co. v. Bailey Co.* 11 Wal. 488 ; *London Dock Co. v. Simmott*, 8 El. & Bl. 492 E. C. L. 353, note.

Not only may a corporation be proceeded against directly by its own creditor, but it may be summoned and proceeded against as a *garnishee* under the law of attachments (as prescribed by V. C. 1873, ch. 148, §§ 2, &c.; V. C. 1887, ch. 141, §§ 2959 & seq.), in respect to debts from it to the attachment-creditor (*Balt. & O. R. R. Co. v. Gallahue's Admr.*, 12 Grat. 655) ; and also in respect to the shares in it held by the attachment-debtor. (*Ches. & O. R. R. Co. v. Paine*, 29 Grat. 508.) And its answer as such garnishee is to be received in the only mode in which a corporation can answer, under its corporate seal. (*Balt. & O. R. R. Co. v. Gallahue*, 12 Grat. 664.)

As to *torts*, it is affirmed by Blackstone that a corporation can neither maintain nor be defendant to an action for *battery*, and such like *personal injuries* ; for, says he, a corporation can neither beat nor be beaten in its body politic (1 Bl. Com. 477) ; and doubtless it is true enough that a corporation *cannot be beaten* ; but it is difficult to understand why, by its servants, it may not *commit a battery*, and still harder to perceive why, if it shall procure such, or any other tort to be perpetrated, it should not be constrained to make satisfaction out of its corporate funds. It has accordingly been held that it may be sued for damages arising from a *breach or neglect of corporate duty*, by itself, or by its officers and agents, within the scope of their authority, as from a turnpike-bridge or canal-locks being out of repair (*Mayor of Lynn v. Turner*, Cowp. 86 ; *Townsend v. S. Turnpike Co.*, 6 Johns. 90 ; *Riddle v. Proprietors, &c.*, 7 Mass. 169) ; or from illegally obstructing a water course (*C. H. Turnpike Co. v. Rutter*, 4 Serg. & R. 6), in which case the old and modern authorities are collected ; or from any other breach or neglect of its corporate duties. (*James Riv. & Kan. Co. v. Early*, 13 Grat. 552 '3 ; *Dunington v. N. W. Turnpike*, 6 Grat. 171.) So a corporation is liable in an action of trespass on the case *in*

trover for the value of chattels illegally converted to its use by its agents or officers (*Yarborough v. Bank of England*, 16 East. 6; *Duncan v. Surry Canal*, 3 Stark. 50); in trespass, or trespass on the case for *malicious injuries* committed through its directors whilst representing it (*Maynard v. Firemen's Ins. Co.*, 34 Cal. 48; *J. R. R. Co. v. Rogers*, 28 Ind. 1); and in trespass for injuries committed *by violence* to the person or property (*Britton v. So. Wales Railway Co.*, 3 Hurlst. & Norm. 963-4; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9; *Fowle v. City of Alexandria*, 3 Pet. 409); that is, supposing the injury to have been done by authority of the corporation, or of its governing power. (*Harman v. City of Lynchburg*, 33 Grat. 42; 2 Dill. Mun. Corp. § 773.) And in Virginia the doctrine is confirmed, if confirmation were needed, by statute, allowing damages to be recovered wherever "the death of a person shall be caused by the wrongful act, neglect, or default of any person or *corporation*, and that the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured, &c., to maintain an action." (V. C. 1873, ch. 145, §§ 7, &c.; V. C. 1887, ch. 137, §§ 2902, &c.) Upon like principles a corporation may become liable as for a constructive trust by reason of the misconduct of its officers. Thus, where the president and acting manager of a corporation is trustee in a deed of marriage-settlement, and as such sells the trust-property, in violation of his duty as trustee, and purchases it for the corporation, the latter being thus made a participator in the violation of the trust, becomes itself a trustee, and in equity is liable accordingly, although the beneficiary must first exhaust the recourse against the president, who was the original trustee. (*Barksdale v. Finney*, 14 Grat. 338.) And where a Federal military commander, during the late civil war, took by force certain supplies of provisions from a farmer near Williamsburg, and turned them over for the use of the inmates of the lunatic asylum at that place, it was held that the taking was not warranted by the laws of war, and did not divest the property of the original owner, so that as his property was applied to the use of the asylum, an action of *trover* lay against it as a corporation, to recover the value of the provisions. (*East. Lun. Asylum v. Garrett*, 27 Grat. 167 & seq.)

The liabilities of *municipal* corporations are to be distinguished according as they arise out of *contract* or out of *tort*. In respect to *contract*, there seems to be no difference between them and other corporations. Like others, they are answerable for all contracts, express or

implied, made by themselves, or by their duly accredited officers or agents, within the scope and for the purposes of their respective charters, (1 Dill. Mun. Corp. §§ 371 & seq.); whilst such as are beyond their corporate powers (*ultra vires*), are void. (1 Dill. Mun. Corp. §§ 381, 382.) Thus, a municipal corporation has power to borrow money, usually not without limit; and where it borrows, within the prescribed limits, it is as responsible for the acts of its agents as a private corporation. (*De Voss v. City of Richmond*, 18 Grat. 338.) And when, on April 2, 1865, in anticipation of the evacuation of Richmond by the Confederate forces, and the entry of the Federal troops of the United States, the city council ordered the destruction of all the liquor in the city, and undertook to pay for it, it was held that the council, under the charter of the city, had authority to make the order and the promise, and that the city was responsible for the value of the liquor destroyed under the order. (*Jones v. City of Richmond*, 18 Grat. 523 '4; *City of Richmond v. Smith*, 15 Wal. 429.)

Whilst speaking of the liabilities *ex contractu*, of municipal corporations, it is not out of place to advert to actions against them (usually in *assumpsit*), to recover back money paid for taxes. It will be observed, that any mere irregularity in the detail and mode of proceeding in levying or collecting the tax, where the tax has actually been levied on property subject to it, does not warrant a recovery. The following requisites must concur in order that such a suit may be successfully maintained against the corporation, namely: (1), The authority to levy the tax must be *wholly wanting*, or the tax itself *wholly unauthorized*; in which cases the assessment is not simply irregular, but *absolutely void*; (2), The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instrument to collect money for the State, or other public corporation or person; and (3), The payment by the plaintiff must have been made, *not voluntarily*, but *upon compulsion*, to prevent the *immediate seizure* of his goods, or the *arrest* of his person. Without the concurrence of these circumstances, *paying under protest* will not give a right of recovery. The same principles apply to actions for the recovery back of money paid for *illegal license taxes, or fines*, imposed by a municipal court. So neither is a town or city liable to a tax-payer for his proportion of *illegal expenses* incurred by the corporate authorities, and paid out of money raised by taxes. And lastly, let it be observed that it is true in respect to corporations of

all sorts, as it is in respect of natural persons, that when money is *voluntarily paid* under a claim of right, without *fraud* or mistake of *fact*, although there is a mistake in *point of law*, as to the party's liability to pay, the money is not recoverable back. (2 Dill. Mun. Corp. § 751; *Lincoln v. City of Worcester*, 8 Cush. (Mass.) 55; *McKee v. Town Council*, Rice (S. C.) Law, 24; *Marriott v. Hampton* (2 Esp. 546, 7 T. R. 269), 2 Smith L. C. 237; *The Collector v. Hubbard*, 12 Wal. 12; *City of Richmond v. Judah*, 5 Leigh, 314-'15, 318 & seq.)

The innocent purchaser of the bonds of a municipal corporation (such bonds being negotiable), is not compromised by the non-observance on the part of the corporation-officers of directions given them, of which such purchaser was not cognizant or wilfully ignorant, even though he may have been wanting in due caution, supposing the bond to have been issued in pursuance of the statutory provisions touching the subject. (*Davis v. Bank of England*, 2 Bingh. (9 E. C. L.) 444; *Royal Brit. Bank v. Turquand*, 5 El. & Bl. (85 E. C. L.) 248; S. C. 6 El. & Bl. (88 E. C. L.) 327; *Commissioners v. Aspinwall*, 21 How. 539; *Supervisors v. Schenck*, 5 Wal. 772; *Menasha v. Hazard*, 12 Otto (102 U. S.), 94; *Ogden v. County of Daviess*, Id. 634; *De Voss v. City of Richmond*, 18 Grat. 352 & seq.)

As to a municipal corporation's liability for *torts*, it is established that it is not liable to an action for damages, either for the omission to exercise, or for the manner in which, *in good faith*, it exercises its governmental or discretionary powers of a public or legislative character; nor for the defaults of its servants and officers in the administration of such function, partaking therein of the immunity of the government of which, indeed, those powers are an emanation. (2 Dill. Mun. Corp. §§ 753 & seq.) Hence a city corporation is not liable for any defaults of its officers in the management of a *small-pox hospital*, established by the city (*City of Richmond v. Long*, 17 Grat. 379); nor for the non-feasance of a corporate officer, in omitting to take a bond of the party as required by an ordinance of the corporation (*Fowle v. Alexandria*, 3 Pet. 398, 409). But it is liable for the neglect and default of its agents, occurring in the exercise of its *private franchises*, which are administered for its own profit, as; for example, in connection with *gas works* (*Scott v. City of Manchester*, 2 H. & Norm. 204; *Ante*, p. 251); or in connection with a public wharf, belonging to the city, and used as a source of profit (*Pittsburg v. Grier*, 22 Penn. St. 54; *Petersburg v. Applegarth*, 28 Grat. 343-'4).

But notwithstanding this general distinction between

the defaults of the officers and servants of a municipal corporation, in the exercise of its *governmental functions*, and of its *private and gainful franchises*, a further distinction must be noted between municipal corporations *proper* (such as *cities and towns*), whose charters are usually bestowed *upon request*, and which in compensation for the advantages conferred, do impliedly, if not expressly stipulate to be answerable for opening, grading, constructing, improving and controlling their streets, side-walks, bridges, sewers, etc., and *quasi* municipal corporations (such as *counties and townships*), which are merely public or State agencies, usually created not by request, but for the general advantage, and independently of statute, are not liable for the defaults of their officers and servants, in respect of highways, drains, etc., (which in their nature are governmental functions), any more than the government itself would be. (*Post*, 629; 2 Dill. Mun. Corp. § 789; Orme v. City of Richmond, 79 Va. 89; Weightman v. Washington City, 1 Black, 39; Barnes v. Dist. Col. 91 U. S. 540; Burnham v. City of Boston, 10 Allen (Mass.), 290.)

In the absence of any provision creating a liability, a municipal corporation is *not bound to provide for and secure a perfect execution of its own municipal enactments, or of the laws of the land*, and is not responsible in a civil action for the neglect of duty on the part of its officers in respect to their enforcement. And hence cities and towns are under no *common law* liability to pay for the *property of individuals destroyed by mobs or riotous assemblages*; but such liability, if it exists at all, depends on *statute-law*. (2 Dill. Mun. Corp. §§ 754, 760.)

Sacred as the law regards the rights of private property, they are yet subordinate to the higher demands of the public welfare—*salus populi suprema lex*. And upon this principle, in cases of *imminent and urgent public necessity*, any individual or public officer may raze or demolish houses, and other combustible structures in a city or compact town, to prevent the spreading of an existing conflagration; and this he may do, independently of statute, and without responsibility to the owner for the damage which he thereby sustains. Thus, in *Mouse's Case*, 12 Co. 63, it was held that a passenger in a barge might cast out any of the lading which should appear to be necessary for the safety of those on board, and several cases are cited from the Year-books wherein it had been held *lawful to pluck down a house in time of fire*; and in the *Saltpetre Case*, 12 Co. 12, the same doctrine is stated upon the same authority, "for the saving of a city or town, a house shall

be plucked down, if the next be on fire." (Maleverer v. Spink, 1 Dyer, 36 b; Governor v. Meredith, 4 T. R. 797; Republica v. Sparhawk, 1 Dal. (Pa.) 337; 2 Dill. Mun. Corp. § 756; Cases of American Print Works, 1 Zab. (N. J.) 248; 3 Zab. 590.) Mr. Dillon (*supra*) quotes an interesting passage from the judgment of C. J. McKean, in 1 Dal. 337 (*supra*): "We find, indeed," says he, "a memorable folly recorded in the third volume of Clarendon's history, where it is mentioned that the Lord Mayor of London, in 1665 (Sept. 1666), when the city was on fire, would not give directions for, nor assent to, the pulling down of forty wooden houses, or to removing the furniture, etc., belonging to the lawyers of the Temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct, *half of the great city was burned.*" But although the common law imposes no liability upon municipal corporations whose officers destroy buildings to prevent the spreading of conflagrations, yet it is often imposed by statute, contained either in the charter or in some general enactment. Such provisions are in accordance with natural equity, which demands that sacrifices made for the public good should be compensated from the public treasury, and being remedial, are to be liberally expounded, yet not strained so as to cover cases not contemplated by them. Thus, where the statute allowed a recovery only when a building was demolished by three designated officers, a destruction of it by one of them only is not within the statute, and creates no liability in the corporation. In like manner, if the statute points out the remedy against the corporation, that alone can be pursued; but if no remedy is indicated, an action lies,—for the most part, an action on the case. (2 Dill. Mun. Corp. §§ 757–759; Russell v. Mayor of N. Y. 2 Denio (N. Y.), 461, 474; Taylor v. Plymouth, 8 Met. (Mass.) 462, 465; Hafford v. N. Bedford, 16 Gray (Mass.), 297; Wheeler v. Cincinnati, 19 Ohio, 19; Fisher v. Boston, 104 Mass. 87; Coffin v. Nantucket, 5 Cush. (Mass.) 269; Mayor v. Pentz, 24 Wend. (N. Y.) 668; Mayor v. Lord, 17 Wend. (N. Y.) 285, 292; White v. Charleston, 2 Hill (S. C.), 571.)

In considering the civil liabilities of *municipal* corporations for injuries to private persons, caused by defective and unsafe streets, side-walks, bridges, and sewers, we must distinguish between municipal corporations *proper*, such as *towns and cities*, and *quasi* municipal corporations, such as *counties and townships*. As to *quasi* corporations, the doctrine, well nigh universal, is that they are not liable to civil actions for damages oc-

casioned by defective roads and bridges, placed by law under their control, as *public agencies*, unless it be so declared by statute. Such corporations are merely public or State agencies, and independently of statute are no more liable than the *government itself*. (2 Dill. Mun. Corp. §§ 85 & seq., 761 & seq.)

But as to municipal corporations *proper* (e. g., towns and cities), the established principle is (notwithstanding former qualifications), that they are not only liable for any default of themselves or their agents in respect to matters with which they are concerned, not governmentally, but for their peculiar advantage and gain, by way of franchise, such as *gas* and *water-works*, but also in respect to their streets, bridges, side-walks, and sewers, for the safety and completeness of which they are, apart from any statute, considered as having tacitly, if not expressly, undertaken to be answerable, in compensation for the advantages conferred by their charters, in pursuance of *their own seeking and request*. And this duty and liability are inferred as of course, in the absence of contrary provisions, wherever the corporation possesses the powers usually bestowed, to open, grade, improve, construct, and exclusively control the public streets, side-walks, bridges, and sewers, along with the authority, by means of taxation and local assessments, to accomplish the object; that is, supposing the corporate authorities to have had notice, actual or implied, of the defect. (2 Dill. Mun. Corp. § 789; Barnes v. Dist. Col. 1 Otto (91 U. S.), 551, and the authorities, Eng., U. States, and State, there cited; Burnham v. City of Boston, 10 Allen, (Mass.) 290; Bailey v. Mayor of N. York, 2 Den. (N. Y.) 531; Rochester Wh. Lead Co. v. Rochester, 3 N. York, 463; West v. Trustees, 16 New York, 163, note; Henley v. Mayor of Lynne Regis, 5 Bingh. (15 E. C. L.) 91; S. C. 3 B. & Ad. (23 E. C. L.) 77; Noble v. City of Richmond, 31 Grat. 275-'6 & seq.; Orme v. City of Richmond, 79 Va., 89; City of Richmond v. Courtenay, 32 Grat. 798; Weightman v. Washington, 1 Black, 39; Nebraska City v. Campbell, 2 Black. 590; Chicago v. Robbins, 2 Black. 418; Robbins v. Chicago, 4 Wal. 670; Mayor v. Sheffield, 4 Wal. 195; Barnes v. Dist. Col. 91 U. S. 551.)

The distinction above adverted to between *quasi* corporations and municipal corporations *proper*, seems to grow out of the fact that the former are constituted public agents, not with a view to their own, but exclusively to the public advantage, and not usually in pursuance of their own solicitation, but of the mere motion of the legislature, and hence are no more re-

sponsible for any tortious default imputed to them than the government itself; whilst, on the other hand, municipal corporations *proper* solicit their charters with eagerness, on account of certain advantages which they are expected to yield to their citizens; and in consideration of these advantages they become bound by agreement, express or implied, to provide, amongst other facilities, easy methods of transit to and fro, and such sewerage as will secure the general health. Yet, even on these latter corporations, powers are generally bestowed which in their nature are not ministerial, but discretionary and governmental, such as the power to establish and maintain a police, to provide for the peace and good order of the community, to provide, when occasion requires, hospitals for contagious disorders, such as small-pox, and to direct the exaction of bonds by their officers, and the like; and for any default on the part of their servants and officers in the performance of these functions, no liability results to the corporation, which is looked upon as a mere agency of the government to effect purposes purely public and governmental, and is therefore as much exempt from responsibility as the government itself. (Henley v. Lynne Regis, 5 Bingh. (15 E. C. L.) 91; Lynne Regis v. Henley, 3 B. & Ad. (23 E. C. L.) 77; S. C. 2 Clark & Fin. 331; West v. Trustees, 16 N. York, 163, note; Detroit v. Blackeley, 21 Mich. 84; Fowle v. Alexandria, 3 Pet. 398; Weightman v. Washington, 1 Black, 39; Nebraska City v. Campbell, 2 Black, 590; Mayor v. Sheffield, 4 Wal. 195; Water Co. v. Ware, 16 Wal. 57; Barnes v. Dist. Col. 1 Otto (91 U. S.), 540; Sawyer v. Corse, 17 Grat. 230; Richmond v. Long, 17 Grat. 379; Noble v. Richmond, 31 Grat. 278; Barnes v. Dist. Col. 91 U. S. 551.)

It is proper to note just here a recognized distinction between the general burdens imposed for State and municipal purposes, which ought to be laid uniformly, so as to operate on all alike, in proportion to each one's taxable property, and special and local assessments, which are made upon the assumption that a portion of the community is to be specially and peculiarly benefited by the contemplated expenditure, in the enhancement of the value of property peculiarly situated as regards the expenditure. Hence, lots of ground may be legitimately charged with the expense of grading and paving the streets, and especially the *side-walks* in front of them, it being supposed that the owners suffer no pecuniary loss thereby, because their property is by the expenditure likely and presumed to be increased in value to an amount at least equal to the sum they are required to

pay. (Ellis v. City of Norfolk, 26 Grat. 224; Sandy v. City of Richmond, 31 Grat. 574; 2 Dill. Mun. Corp. §§ 596-600; Cool. Const. Limitations, §§ 619-636 (3d ed. p. 497); Cool. Taxation, 416-473, 398.

A distinction is sometimes made between the legality of assessments for *side-walks* and for *streets*, for the grounds of which see Cool. Taxation, 398, 453.

It is especially to be observed that the municipal authorities of a city, being obliged by their duty, and having by their charter full power in their discretion to lay off, construct and grade streets, the *due exercise* of the power cannot, in the nature of things, be wrongful in a legal point of view; and hence, although it may be attended or followed by damage, as a necessary incident, to the owners of adjacent lots, yet it is *damnum abque injuria*, that is, a damage without wrong, and imposes no legal liability upon the corporation, unless the city charter or some other statute shall so provide. If, however, the power be not duly exercised, that is, if it be exercised without proper care and precaution, and injury results, the city is answerable therefor. Thus, where, in filling up a street, it is done by the city authorities in such a manner that the water, which before had been carried off by gutters, is thrown back upon an adjacent lot, the corporation is liable for the damage done to the lot, if, by reasonable and proper care and skill, it might have been prevented. (2 Dill. Mun. Corp. §§ 782-3, 802; Brim. v. Great W. Railway Co. 2 Best. & Sm. (110 E. C. L.) 411; Callender v. Marsh, 7 Pick. (Mass.) 418; Perry v. City of Worcester, 6 Gray (Mass.), 544; Sprague v. City of Worcester, 13 Gray, 193; Radcliff v. Mayor of Brooklyn, 4 Comst. (N. Y.) 195; Wilson v. Mayor of N. Y. 1 Den. (N. Y.) 595; Mills v. City of Brooklyn, 32 N. Y. 489; Carr v. North. Libs. 35 Penn. St. 324; City of Madison v. Ross, 3 Ind. 236; City of Delphi v. Evans, 36 Ind. 90; Hoffman v. City of St. Louis, 15 Mo. 651; Keasy v. Louisville, 4 Dana (Ky.), 154; Mayor of Rome v. Omberg, 28 Ga. 46; White v. Yazoo City, 27 Miss. 357; Smith v. Washington City, 20 How. 135; Pumpelly v. Greenbay Co. 13 Wal. 166; Transportation Co. v. Chicago, 99 U. S. 635; Smith v. City of Alexandria, 33 Grat. 211 & seq.; Kehrer v. City of Richmond, 81 Va. 747 & seq.) And so where a city in lowering the grade of one of its streets, makes a deep declivity of several feet at the intersection of another street or passway, and omits to put up some barrier to warn passers by, whereby one ignorant of the change of grade, and without negligence, at night falls down the declivity and is hurt, the city is liable in damages for the injury. (Orme, &c. v. City of Richmond, 79 Va. 86.)

It is an invariable maxim of the common law courts (although not respected in the courts of equity), that no man shall sue himself, or any *partnership* of which he is a member (1 Bl. Com. 18, 19; 1 Lom. Ex. 646 & seq.); and it, therefore, illustrates how wholly the individual shareholder is lost in the corporate body, that this maxim does not forbid a corporation to be sued by one of its own members, nor *vice versa*. And so, also, a member of a corporation may, at common law, secure payment of his demands against the corporation by taking a deed of trust or mortgage on its property, or by means of legal process,—as attachment, execution, or judgment,—and that in preference to other creditors (Burr v. McDonald, 3 Grat. 234; Ang. & A. Corp. (10th ed.) § 390); although in Virginia, by statute (V. C. 1873, ch. 51, § 63; V. C. 1887, ch. 47, § 1149), it is declared that, in the case of corporations created by the circuit court, every such lien or incumbrance shall enure to the benefit ratably of *all the creditors* existing at the time when the lien was obtained, save only when it is made to secure a debt contracted or money borrowed at the time it was made.

It is acknowledged that a corporation-aggregate cannot be guilty of treason or of any felony, nor of any crime which can only be adequately punished *corporally*, and there are not wanting *dicta* that it cannot be guilty of *any crime of commission* whatever. There seems, however, to be no reason, in nature or policy, why a corporation aggregate may not be indicted for and convicted of *any misdemeanor* whose appropriate punishment is a pecuniary mulct, whether the offence be of commission or omission. Of the latter (offences of *omission*), instances not unfrequently present themselves (*e. g.* in *nuisances* of omission); but cases of *commission* also, are not wanting (*e. g.* *obstructing highways*, etc.). When a crime of more heinous character is perpetrated in connection with the affairs of a corporation, the persons guilty of it, although officers and agents of the corporate body, are to be prosecuted *personally*; and, indeed, they are liable also to be proceeded against personally for all the torts and misdemeanors for which an indictment or action lies against the corporation. (Hawk. P. C. B. I. c. 66, § 13; *Id.* c. 76, § 8; Ang. & A. Corp. (10th ed.), §§ 394 & seq.; Reg. v. B. & Cr. Railway Co. 9 Car. & P. (38 E. C. L.) 469.) Thus, in *King v. Mayor, &c. of Liverpool*, 3 East. 86, and in *Reg. v. Mayor, &c. of Lincoln*, 8 Ad. & El. (35 E. C. L.) 65, no question was made that a corporation was indictable for *not repairing a highway*; nor in *King v. Mayor, &c. of Stratford*, 14 East. 348, for the *non-repair*

of a bridge; and in *Reg. v. Scott*, 3 Ad. & El. N. S. (43 E. C. L.) 459, and *Reg. v. Great N. Railway*, 9 Ad. & El. N. S. (58 E. C. L.) 326, it was agreed that it was liable to indictment for *obstructing a highway*. In Virginia, at all events, there is no doubt that a corporation is, in *some cases*, liable to indictment, presentment, or information (however it may be a question *what the cases are*); for we have a statute providing that on any such prosecution the summons may be served on the corporation, as in civil suits (see *Post*, pp. 638 & seq.); and if it fail to appear, the court may proceed to trial and judgment without further process, as if defendant had appeared and pleaded *not guilty*. (V. C. 1873, ch. 201, § 29; V. C. 1887, ch. 196, § 4015.)

Whether a foreign corporation is capable of *being sued* in any other State depends on the statute law thereof touching the mode of serving process, and generally of proceeding against *non-resident parties*. A non-resident natural person may come within the limits of the State, and is then universally as liable to the process of the courts as if he were a citizen; but a foreign corporation cannot leave its proper *habitat*, the country where it was created; and although its officers may do so, yet as there is no natural principle of law which enjoins that process against a corporation shall in all cases be served on any particular officer, the *statutes of the State* where the suit is brought can alone determine how the process shall be executed, or whether it can be executed at all. The provision in Virginia for proceeding against non-residents is comprehensive enough to include, and does include, non-resident corporations. "On affidavit," says the statute, "that a *defendant* is a non-resident of this State, . . . an order of publication may be entered against *such defendant*." (V. C. 1873, ch. 166, § 10; V. C. 1887, ch. 158, § 3230; *U. S. Bank v. Merch. Bank*, 1 Rob. 586 to 590; *Balt. & O. R. R. Co. v. Gallahue*, 12 Grat. 655; *Beaston v. Farmers Bank*, 12 Pet. 134; *Railroad Co. v. Harris*, 12 Wal. 83 & seq.; *Goshorn v. Supervisors*, 1 West Va. 308; *Balt. & O. R. R. Co. v. Wightman*, 29 Grat. 435; *Balt. & O. R. R. Co. v. Hoell*, 32 Grat. 397; *Cowardin v. Universal Life Ins. Co.* 32 Grat. 447; *Ante*, p. 568.)

Foreign *insurance* companies, before they can do business in Virginia, are required to designate in writing some citizen of Virginia, residing in Richmond, as their agent or attorney, upon whom process may be served with like effect as upon the principal. (V. C. 1873, ch. 36, §§ 19-23; V. C. 1887, ch. 53, §§ 1265 to 1267.) But

whilst this provision makes it practicable to sue such companies, either at law or equity, in the State courts, without an order of publication, as would be otherwise necessary (*Continental Ins. Co. v. Kasey*, 25 Grat. 268; *Conn. Mut. Life Ins. Co. v. Duerson*, 28 Grat. 630), yet it does not make a foreign corporation a *resident* of the State, which indeed is impossible, for, as we have seen, such corporation must *dwell in the place of its creation*, and cannot migrate to another sovereignty (*Ex parte, Schollenberger*, 6 Otto (96 U. S.), 377); and therefore such foreign insurance companies may still be proceeded against as *non-residents* by way of foreign attachment. (*Cowardin v. Universal Life Ins. Co.* 32 Grat. 448-453.)

If the proceeding meditated against the foreign corporation involve consequences incompatible with its foreign *habitat*, and the necessarily alien character of the defendant, that proceeding cannot be maintained. Hence, where in New York, upon a statutory summary process, it was provided that the defendant might supersede the process, upon giving security to *appear and plead to any action at law, or in equity, brought against him in the State, within six months*, and there was no law allowing an *ordinary suit* thus contemplated to be instituted against a foreign corporation, it was held that neither did such summary process lie against it. (*McQueen v. M. Man. Co.* 16 Johns. 4.) But if nothing is required, in respect to the proceeding in question, but that the defendant should *appear and plead to that process*, or should give security to perform the decree or order *in that cause*, these may be done by a foreign corporation by attorney or agent, and therefore do not preclude the proceeding against it. (*U. S. Bank v. Merch. Bank*, 1 Rob. 588-9; *Cowardin v. Universal Life Ins. Co.* 32 Grat. 448-452.) Upon this ground, in the cases last named, an *attachment in chancery* against a foreign corporation was sustained, and doubtless any other kind of attachment would be, under the statute. (V. C. 1873, ch. 148, §§ 1 to 5, 11; V. C. 1887, ch. 141, §§ 2959 to 2964.) And so, process of *interpleader* (V. C. 1873, ch. 149, §§ 2, 3; V. C. 1887, ch. 142, §§ 2999, 3000), and process of distress (V. C. 1873, ch. 134, §§ 7 & seq.; V. C. 1887, ch. 127, §§ 2787 2788), seem to be in like manner available against such a corporation. (*Allen & als. v. Hart*, 18 Grat. 723.)

And in this connection let it be observed that, for *civil purposes*, corporations are in law deemed *persons*, and will therefore be comprehended in that phrase wherever it occurs, in giving a remedy or otherwise, unless the context demands a contrary construction. (U.

S. v. Amedy, 11 Wheat. 393; Beaston v. Farmers Bank, 12 Pet. 134 '5; Stribbling v. Bank of Valley, 5 Rand. 132, 140 & seq.; U. S. Bank v. Merchants Bank, 1 Rob. 589-90; Balt. & O. R. R. Co. v. Gallahue, 12 Grat. 655; West. U. Tel. Co. v. Richmond, 26 Grat. 20; Miller v. Com'th, 27 Grat. 110.)

It may be stated here, although it belongs more properly to the next head, that after the property of a foreign corporation has been transferred to and vested in a receiver, for the benefit of its creditors, under an order of a court of equity in the State where the corporation has its abode, it cannot be reached as the *property of the corporation* by an attachment in another State. (Thomas v. Merch. Bank, 9 Pai. (N. Y.) 215; Folger v. Col. Insur. Co., 98 Mass. 267; Ang. & A. Corp. (10th ed.) § 403.)

An interesting question arose in Clark v. N. J. St. Nav. Co., 1 Stor. Circ. Ct. 531, namely: whether the United States courts, sitting in one State, can take cognizance of a suit *in personam*, in admiralty, against a corporation created by another. It was held by Mr. J. Story that, although by the *common law* foreign corporations and non-resident aliens cannot be served with process by any of the courts of common law, nor their property *be attached* to compel their appearance, yet the district courts of the United States (as *courts of admiralty*) may award *attachments* against the property of either found within their local jurisdiction, for they then proceed, as courts of admiralty delight to do, *in rem*, by virtue of their jurisdiction *over the property itself*, and thus indirectly acquire a jurisdiction *in personam*, in which aspect it is immaterial whether the property belongs to a natural person or to a corporation.

2^e. Mode of Proceeding in Suits by or against Corporations; W. C.

1^f. Mode of Proceeding in Suits where the *Corporation is Plaintiff*.

A corporation must sue in its true corporate name, accurately stated, and in its *declaration* or complaint (except it be an ancient body existing *by prescription*), it ought to state the *fact of its incorporation*, although it is not needful to set out the charter itself; nor, indeed, is the averment that it is a corporation *indispensable*, though it be proper. (1 Chit. Pl. 286, 416; Legrand v. Hamp. Sid. Col. 3 Munf. 324; Taylor v. Bank of Alexandria, 5 Leigh, 475; Lithgow's Case, 1 Va. Cas. 305; Rees v. Conococheague Bank, 5 Rand. 329 '30; Case of Mayor, &c. of Lynne Regis. 10 Co. 120.) But at common law the *fact of incorporation* must be proved *at the*

trial, unless it be *admitted in the pleadings*, or unless the charter be a *public statute* (of which the courts must *ex officio* take notice), as the *charters of our own state banks* are held to be in Virginia. (Stribbling v. Bank of Valley, 5 Rand. 132; Hays v. N. W. Bank, 9 Grat. 130.) Thus, upon the general issue of *nil debet*, or *non assumpsit* (pleas which do not admit the fact of incorporation), and also in case of all *motions* for judgment (*e. g.*, against delinquent shareholders), proof of incorporation is requisite at the trial, wherever the charter is *not a public statute*. (Henriques v. Dutch W. Ind. Co. 2 Ld. Raym. 1532; Grays v. Turnpike Co. 4 Rand. 578; Rees v. Conococheague Bank, 5 Rand. 329-'30; Taylor v. Bank of Alex'a, 5 Leigh, 475; Jackson v. Bank of Marietta, 9 Leigh, 240; Bowyer v. Turnpike Co. 9 Grat. 109.) But this common law obligation on the plaintiff to prove the fact of incorporation at the trial, is materially qualified in Virginia by statute (V. C. 1873, ch. 167, § 40; V. C. 1887, ch. 159, § 3280), which enacts that where plaintiffs or defendants sue or are sued *as a corporation*, it shall not be necessary to prove the *fact of incorporation*, unless with the pleading which puts the matter in issue there be an *affidavit denying such incorporation*. (Balt. & O. R. R. Co. v. Sherman, 30 Grat. 606-'7; Crews v. Farmers Bank, 31 Grat. 348, 356.) And it is to be observed that when the writ and declaration are in the name of a plaintiff which indicates the plaintiff to be a corporation, although the fact be not otherwise averred, the plaintiff "*sues as a corporation*," and is not required under this statute to prove its corporate existence, unless the defendant files an affidavit denying the incorporation. (Gillett v. Amer. Plow & Hollowware Co. 29 Grat. 565.)

The fact of the existence of a corporation is to be established, in general, by proof of the charter, of which, if it be by *public statute*, the courts will *ex officio* take notice; that is, supposing it to be a domestic corporation. If the charter be by private statute, or by order of a circuit court, or if it be a *foreign corporation*, the courts do not *ex officio* notice it; but it *must be proved*, in case of a *foreign corporation*, by a copy of the charter, *exemplified* under the great seal of state, or by an *examined copy*; and if it be a *domestic corporation*, by a copy certified by the secretary of state, or an examined copy if granted by a circuit court or judge; or if granted by the legislature, by a copy certified by the *keeper of the rolls*, or an examined copy, or a copy purporting to be printed by the public printer. A legislative charter from another State in the Union may also be proved by a

copy printed by authority, and so may a charter granted by congress. (Rev. Stats. U. S. (2d ed.) § 908; Id. Appt. p. 1092, § 4; V. C. 1873, ch. 15, § 8; Id. ch. 14, § 14; V. C. 1887, ch. 164, § 3327; Id. ch. 15, § 207; Taylor v. Bank of Alexandria, 5 Leigh, 471; Thompson v. Musset, 1 Dal. 462; 6 Binn. 321; 2 Stew. & Port. (Ala.) 91; 3 Pick. 293; Pot. Dwar. Stats. 57, 60; *Ante*, pp. 43, 44.)

Where the mere charter does not create the corporation, but something additional is required to be done in the way of *organization*, etc., it is requisite to prove, not the existence of the charter only, but also that the steps subsequently contemplated were taken, and the company duly organized, etc. (King v. Mothersell, 1 Stra. 93; Rex v. Martin, 2 Campb. 101, and note; Grays v. Turnpike Co. 4 Rand. 578; Owings v. Speed, 5 Wheat. 420.) But the holding of meetings under the charter, the election of officers, and the doing of other corporate acts, are in general sufficient evidence of the existence of a company. (Ang. & A. Corp. (10th ed.) §§ 84, 85; *Ante*, 570-'72.)

It may be added that it is no defence to an action by a corporation that its charter was obtained by fraud, nor that by *non-user* or *mis-user*, it is *liable* to be forfeited. These circumstances may be good ground for cancelling the charter, but that can be done only upon a writ of *quo warranto*, instituted in the name of the commonwealth for the purpose, and until the forfeiture is *judicially declared*, no advantage can be had of it in collateral suits. (Crump v. U. S. Min. Co. 7 Grat. 352; People v. Manhattan Co. 9 Wend. 351; Trent v. Cartersville Bridge Co. 11 Leigh, 529.)

A *plea by a corporation must purport to be by attorney*, the body being incapable of appearing *in person* as a natural person may; and it is also safer, if not necessary, that the declaration likewise should *purport to be by attorney*. (1 Chit. Pl. 584.)

2^d. Mode of Proceeding Where a Corporation is Defendant.

It will be expedient here to follow the proceedings more into detail, and to show, (1). The place where, in Virginia, suit is to be instituted against a corporation; (2). The process to be employed to commence a suit or action against a corporation; (3). Mode of serving process on a corporation; and (4). Proceedings in suits against corporations after process served;

W. C.

1st. The Place where, in Virginia, Suit is to be Instituted against a Corporation.

The rule is prescribed by statute, and is the same for

actions at law and suits in equity. (V. C. 1873, ch. 165, §§ 1 to 3; V. C. 1887, ch. 157, §§ 3214 to 3216.) The statute enacts that actions at law or suits in equity, except where otherwise specially provided, may be brought in the circuit or corporation court of any county or corporation, if a corporation be defendant, wherein—

1, Its principal office is ; or

2, Its mayor, rector, president, or other chief officer resides (V. C. 1887, ch. 157, § 3214 (cl. 1 and 2) ; or

3, Wherein the cause of action, or *any part thereof*, arose (V. C. 1887, ch. 157, § 3215.) But in this case the process is not to be sent to another county or corporation than that in which the suit is brought, unless it be against a railroad, express, canal, navigation, turnpike, telegraph, or telephone company, or against two or more defendants, one of whom has been served with process in that county or corporation, etc. (V. C. 1887, ch. 158, § 3220) ; or,

4, Wherein, in an action on a policy of insurance, the property insured is situated, or the person whose life is insured resides, at the date of the policy. (V. C. 1873, ch. 165, § 1 (cl. 2) ; V. C. 1887, ch. 157, § 3214 (cl. 2) ; or,

5, If the suit be against a *foreign corporation* which has estate or debts owing to it within this State, wherein such land, estate, or debts, or any part thereof, may be (V. C. 1887, ch. 157, § 3214 (cl. 4)) ; or

6, If it be a suit in which a *public corporation* (e. g., the board of education, or board of public works, etc.) must be a party, only in the city of Richmond. (V. C. 1887, ch. 157, § 2514 (cl. 6).)

2^d. The Process to be Employed to Commence a Suit or Action against a Corporation.

At common law no writ of *capias ad respondendum*, or other writ of *arrest*, lies against a corporation, for its existence being ideal only, it is incapable of being apprehended or committed to prison ; and therefore it cannot be *outlawed*, for outlawry supposes a precedent right of arresting, which has been defeated by the party's absconding ; and that also a corporation cannot do. For these reasons the proceedings to compel a corporation to appear to any suit by attorney are, at common law, always *by distress* on its goods, and the profits of its lands, after a summons has been executed and not obeyed. And as it *has no soul*, as Lord Coke gravely observes (Sutton's Hospital, 10 Co. 326), it is not liable to be summoned into the ecclesiastical courts on any account ; for those courts act only *pro salute*

animæ, and their sentences can only be enforced by spiritual censures, which, with corporate bodies, would be misplaced and futile. (1 Bl. Com. 477; 1 Tidd's Pr. 121.)

In Virginia the statute indicates the process to be a *writ of summons*, commanding the officer to *summon* the defendant to answer the bill or action. (V. C. 1873, ch. 166 § 5; V. C. 1887, ch. 158 § 3223.) No distinct provision is made by the statute to *compel corporations* specifically to answer to the suit or action, but the general methods prescribed for that purpose are not inapplicable to corporations, whether at law (V. C. 1873, ch. 167, §§ 44, 45; V. C. 1887, ch. 159, §§ 3285, 3287;) or in equity (V. C. 1873, ch. 167, §§ 47, 48; V. C. 1887, ch. 159, §§ 3289, 3290); and in equity are well supplemented by the *process of distress* used at common law, and, if necessary, the proceedings for contempt. (Stor. Eq. Pl. § 44; Barton's St. in Eq. 47, 91.)

3^d. Mode of Serving Process on a Corporation.

At common law the original summons against a corporation is served on the head officer, and if the defendants do not appear in due time by attorney, the next process is a writ of *distringas* (or *distress*), in pursuance of which the officer is to distrain the corporation by its goods and by the profits of its lands, but not by the property of the individual corporators; so that, if the body has neither lands nor goods, there is no way to *compel it* to appear, at law or in equity. (1 Tidd's Pr. 121.)

In Virginia the statute (V. C. 1887, ch. 158, §§ 3225, & seq.) provides that *process against, or notice to*, a corporation, may be served as follows, namely: in the case of—

A City or Town.—On the mayor, recorder, or any alderman, councillor or trustee;

A Bank.—On the president, cashier, treasurer, or any one of its directors;

A Rail-Road Company.—On the president, cashier, treasurer, general superintendent, or any one of its directors;

Any Other Corporation Created by Virginia.—On the president, rector, or other chief officer, cashier, treasurer, secretary, or any one of its directors, trustees or visitors;

Any Corporation Created by Some Other State or Country, or in any case, if there be not in the County or Corporation where the case is Commenced, any other person on whom there can be service as aforesaid.—On any agent of the corporation (unless it be a case against

a bank), or any person declared by the laws of Virginia, to be an agent. And if there be no such agent in the county or corporation where the suit is commenced, upon affidavit of that fact, by *order of publication*, published once a week for *four successive weeks*, in a newspaper printed in this State.

When a Corporation is operated by a Trustee or Lessee for its own benefit, or for the benefit of its Creditors.—On the trustee or lessee; or on any agent of either, if the trustee or lessee do not reside in the county or corporation wherein the case is commenced. And if no agent, then by order of publication.

Mode of Serving Process.—Service of process or notice is by delivering to the party a copy of the process or notice in the county or corporation wherein he resides, or his place of business is, or the principal office of the corporation is located. And the returns shall show this, and state *on whom and when* the service was; otherwise it *shall not be valid*. (Norf. & West. R. R. Co. v. Cottrell, 83 Va. 512.)

How long to be served in certain cases before the return day.—If the process or notice be served on an agent, or be served in any other county or corporation than that wherein the suit or other proceeding is brought it shall be served *at least ten days* before the return day of such process or notice.

What the term "Agent" includes.—It includes

- (1), A telegraph or telephone operator;
- (2), A depot or station-agent of a railroad company;
- (3), A toll-gatherer of a canal or turnpike company;
- (4), An agent appointed for a foreign insurance company.

Proceedings similar to those above set forth are also provided when an action is brought against a corporation *before a Justice of the Peace*, upon small demands. (V. C. 1887, ch. 158, §§ 3225 to 3227; Id. ch. 140, § 2940; Barksdale v. Neal, 16 Grat. 319.)

The person on whom, as above stated, the process against a corporation shall be served, is rigorously regulated by the terms of the statute. Thus in a suit against *a city or town*, the service as prescribed by the statute may be on the "mayor, recorder, or any alderman, concilman or trustee of such city or town," and if served on any other officer, or on *an auditor*, a judgment *by default*, founded upon process thus illegally served, is *absolutely null and void*. (Fairfax v. City of Alexandria, 28 Grat. 29; 4 Min. Inst. (2d ed.) (533) 577.)

It may be observed in conclusion, that no foreign in-

insurance company can make any contract of insurance in this State, until it has, by written power of attorney, appointed a citizen of Virginia, *residing in Richmond*, its agent, upon whom process may be served, and who may enter an appearance on its behalf. (V. C. 1887, ch. 53, §§ 1266 to 1269; Conn. Mut. Life Ins. Co. v. Duerson, 28 Grat. 644-5.)

4*. Proceedings in Suits against Corporations, after Process Served.

The proceeding against a corporation, after once it has been properly convened before the court, is substantially the same as in case of a natural person. Whether plaintiff or defendant, the corporation ought to be designated by its true name; and at common law, if a mistake occurs in either, it may be taken advantage of by a plea *in abatement* for the *mis-nomer*, but not by a *plea in bar*, in consequence of any supposed variance from the alleged cause of action, that is, unless there be no such corporation *in rerum natura*. (1 Chit. Pl. 282; Mayor, &c. of Stafford v. Bolton, 1 Bos. & Pul. 40; Jowett v. Charnock, 6 M. & Selw. 46; Boughton v. Freere, 3 Camp. 29; Doe v. Miller, 1 B. & Ald (4* E. C. L.) 753.) In Virginia, by statute, no plea in abatement for *mis-nomer* is allowed in any action; but the declaration may on the *defendant's motion*, and on affidavit of the right name, be amended by inserting the right name. (V. C. 1873, ch. 167, § 18; V. C. 1887, ch. 159, § 3258.) And where the contract, being in writing, is made by or to a corporation, by a name different from its true name only *in syllabis et verbis*, and not *in sensu et re ipsa*, the best course is to sue by the *right name*, and aver in the declaration, in describing the writing, that it was made by or to the body by the name mentioned in the instrument, by which name, as well as by the right name, it is called and known. Of course the identity of the corporation named in the instrument, with that which sues, or is sued, must be made to appear at the trial, a diversity *in syllabis et verbis* being of no importance if it appear by express averment in the pleadings, or by the finding of a jury, that the bodies are one and the same. (Case of Mayor, &c. of Lynne, 10 Co. 125 b; Culpeper, &c. Man. Soc. v. Digges, 6 Rand. 167-8; Ang. & A. Corp. (10th ed.) §§ 647 and seq.)

The testimony of a corporator is not at common law admissible for the corporation, wherever any advantage, however slight, can redound to him from his testimony: save only for collateral purposes, as to prove the custody or loss of a document, &c. But where the members of

the body corporate have no private pecuniary interest therein, they are competent witnesses, as in case of the trustees or members of a purely charitable foundation, such as a hospital, etc. So they may in general be made competent by assigning their shares, fully paid up, or by a legal sentence of disfranchisement. (Rex v. Mayor of London, 2 Lev. 231; Stevenson v. Nevinston, 2 Stra. 583; S. C. 2 Ld. Raym. 1533; Mayor of Colchester's Case, 1 P. Wms. 595; Ang. & A. Corp. (10th ed.) §§ 652-656; Id. §§ 660, 661.) But at present, in Virginia, interest constitutes no disqualification to testify. "No person," says the statute, "shall be incompetent to testify because of interest." (V. C. 1873, ch. 172, § 21; V. C. 1887, ch. 164, § 3345.)

Whether the *admissions* of a member of a corporate body may be proved against the body, is a question not wholly settled. It would seem that whenever a corporator may not at common law be examined as a witness, he has *such a joint interest* as would make his admissions evidence against the corporation more or less persuasive, according as his opportunity and motive to ascertain the truth of the fact admitted were greater or less. (1 Greenl. Evid. § 175 & n. 4; Ang. & A. Corp. (10th ed.) §§ 657, 658.)

Proceedings in equity, by a corporation *as complainant*, are, in the main, conducted in like manner as by a natural person; and with us the same rule prevails as at law touching the necessity and modes of proving the incorporation. (*Ante*, pp. 635-'36.) Proceedings against a corporation *as defendant*, are marked by several diversities as compared with those against a natural person. Thus, the *answer* of a corporation must be under the *common seal*, instead of under oath; but so far as it is responsive to the bill, it has the same effect as if it were sworn to. (4 Min. Insts. 1191, 1192; Mitf. Eq. Pl. 9; Stor. Eq. Pl. § 874; Bart. St. in Eq. 110; Rex v. Windham, Cowp. 377; Anon. 1 Vern. 117; Thornton v. Gordon, 2 Rob. 719; Balt. & O. R. R. Co. v. Gallahue, 12 Grat. 655, 664); and where the custodian of the common seal refuses to affix it to an answer to which the proper authorities have assented, he may be constrained to do it by *mandamus*. (Rex v. Windham, Cowp. 377.)

As the answer thus, under the *common seal*, how false soever it may be, involves no perjury, where an appeal is really desired to be made to somebody's conscience for a discovery of facts, it is customary to make such of the officers or individual corporators as are supposed to be personally cognizant of them, parties

defendant along with the company itself; and notwithstanding the general rule in equity is that a mere witness shall not be made defendant to a bill, yet the convenience of the practice in question has caused it to be long employed both in England and in this country. (Bac. Abr. Corp. (E.); Wyeh. v. Meal, 3 P. Wms. 310; Moodalay v. Morton, 1 Bro. C. C. 469; Dummer v. Chippenham, 14 Ves. 245, 252; Stor. Eq. Pl. § 235.)

Independently of statute, the appearance and answer of a corporation are compelled in equity, after service of the first process of *subpœna* (as the summons in chancery is styled), by *distringas*, or distress of the corporate chattels and the profits of the lands; and if that be unavailing, by further process of contempt. (Stor. Eq. Pl. § 44; Ang. & A. Corp. (10th ed.) §§ 667 & seq.) In Virginia, the summons is in like terms as at law, and is followed by like orders, taking the bill for confessed, and entering a decree by default against the defendant, and, if need be, constraining an answer by process of contempt. (V. C. 1873, ch. 167, §§ 43, 47, 48; V. C. 1887, ch. 158, §§ 3223, 3224; Id. ch. 159, §§ 3283, 3284, 3289, 3290, 3291; *Ante*, p. 638.)

7d. Power to Remove Members and Officers.

See Kent's Com. 224; Ang. & A. Corp. (10th ed.) §§ 110, 410 & seq., 423; *Ante*, pp. 576 & seq.

3c. Disabilities of Corporations.

The disabilities of corporations are thus summed up, not with entire accuracy, by Sir Wm. Blackstone (1 Bl. Com. 476-7). Numbers are attached to the several propositions, in order to point out those inaccuracies, or the changes in doctrine which have occurred since he wrote:

(1), "It must always appear by attorney, for it cannot appear in person, being, as Sir Edw. Coke says, invisible, and existing only in intendment and consideration of law;

(2), "It can neither maintain, nor be made defendant to, an action of *battery*, or such like personal injuries; for a corporation can neither beat nor be beaten in its body politic;

(3), "A corporation cannot commit treason or felony, or other crime, in its corporate capacity, though its members may in their distinct individual capacities;

(4), "Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood;

(5), "It cannot be executor or administrator, or perform any personal duties; for it cannot *take an oath* for the due execution of the office;

(6), "It cannot be *seised of lands to the use of another*, for such kind of confidence is foreign to the end of its institution;

(7), "Neither can it be committed to prison; for its existence being ideal, no man can apprehend or arrest it;

(8), "And therefore, also, *it cannot be outlawed*; for outlawry always supposes a precedent right of arresting, which has been defeated by the party's *absconding*, and that, also, a corporation cannot do; for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always *by distress* on their lands and goods;

(9), "Neither can a corporation be *excommunicated*; for it *has no soul*, as is gravely observed by Sir Edward Coke (Sutton's Hospital, 12 Co. 326);

(10), "And therefore, a corporation is not liable to be summoned into the ecclesiastical court upon any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures."

We have seen, in the course of the discussion, that some of these propositions have been by subsequent authorities overruled, and others qualified, and it will, therefore, be expedient to consider them in order;

W. C.

1^d. Disability of a Corporation to *Appear in Person*.

This disability exists as stated by Blackstone.

2^d. Disability to Maintain, or be made Defendant to, an *Action for Battery*, or such like Personal Injuries.

The modifications of this doctrine have been set forth.

(*Ante*, p. 623.)

3^d. Disability to *Commit Treason or Felony, or other Crime*.

This is true as to treason or felony. As to misdemeanors, which may be appropriately punished *by fines*, it is materially qualified. See *Ante*, p. 623.

4^d. Disability to suffer Corporal Penalties, or to be Liable to Attainder.

This disability exists as stated by Blackstone.

5^d. Disability to be *Executor or Administrator*.

This disability was never applied to any but corporations *aggregate*, for as corporations *sole* can prove the will and take the oath, they were never considered to be within the disability. And it seems to be now settled, that when even an *aggregate corporation* is named executor, it may appoint persons styled *syndics* to receive administration with the will annexed, who are sworn like other administrators. It is remarkable that Blackstone should have taken no notice of this qualification, seeing that it had been exemplified in the will of Mr. Viner, whereby he endowed the professorship by virtue of which the commentator was delivering the lectures which constituted the substance of his great work. Mr. Viner had substantially constituted the University of Oxford his executor, which committed the work to several members of the university convocation, who by the

proper court were appointed to act as *administrators with the will annexed*. (1 Bl. Com. 28, note (d); Bac. Abr. Ex'or, (A.) 2; 1 Lom. Ex. 165 '6.)

6^d. Disability to *stand Seised to a Use*, or to be a *Trustee*.

It is true, as Blackstone suggests in referring to this disability, that a corporation, being a *political institution*, set on foot for objects of public benefit, has no other capacities and powers than are necessary, or fairly auxiliary, to effect the purposes of its creation. But it is now perfectly settled that it may be *seised to uses*, either as a feoffee or bargainor, and *a fortiori* may be a *trustee* for purposes *not foreign to its institution*. And whenever a corporation may be a trustee, equity will compel a due observance and fulfilment of the trust; and as we have seen (*Ante*, p. 614), if the corporation is not competent, for any reason, to fulfil the trust, equity will supply another trustee. (2 Kent's Com. 279; 2 Th. Co. Lit. 601, n. (C.); Gilb. Uses, &c. 6 & seq. n. (1); Id. 367; Atto. Gen. v. Utica Ins. Co. 2 Johns. C. R. 389; Jackson v. Hartwell, 8 Johns. 422; Phillips Acad. v. King, 12 Mass. 546; Sutton v. Cole, 3 Pick. 232; Amherst Acad. v. Cowes, 6 Pick. 427; Vidal v. Girard's Ex'ors, 2 How. 127; Dummer v. Chippenham, 14 Ves. 252-3; Atto. Gen. v. Foundling Hospital, 2 Ves. Jr. 42, & n. (2).)

7^d. Disability to be *Imprisoned*.

This disability, of course, exists without modification, and is attended by the general consequences stated by Blackstone.

8^d. Disability to be *Outlawed*.

This disability, doubtless, remained without change with us, whilst outlawry existed, as it does no longer. (V. C. 1887, ch. 196, § 4014.)

9^d. Disability to be *Excommunicated*.

As we have no ecclesiastical authority in this country clothed with civil power, there can be no such process with us as that of excommunication, of which the law takes cognizance.

10^d. Disability to be *Summoned into the Ecclesiastical Courts*.

We have no ecclesiastical courts in Virginia, and, of course, a corporation can be under no disability in respect to them, any more than a natural person.

5^b. The Relation of Members to the Corporation: w. c.

1^c. Personal Liability of Members *for the Contracts and Torts of the Corporation*,

In general the members individually are not responsible for the engagements of the body corporate, or for its torts. In the case of corporations *not municipal*, the members are liable only when it is so provided in the charter or by some general statute, or when they have been so *personally*

concerned in the transaction as to have made themselves liable by their own act, either by a promise, in case of *contract*, or in case of *tort*, by participating therein. (Bac. Abr. Corp. (E.) 5; Harman v. Tappenden & als. 1 East. 555; S. C. 3 Esp. 278; Anderson v. Comth, 18 Grat. 295, 297 & seq.; 2 Kent's Com. 272, n. b. But see Harvey v. E. India Co. 2 Vern. 396, note, citing Salmon v. Ham-borough Co.) Municipal corporations, such as cities, counties, &c., having usually no corporate fund, each inhabitant, it has been said, is liable for every established demand against it, if the *statute* gives a suit against such a community. (2 Kent's Com. 274; *Ante*, pp. 539, 549.) This doctrine, however, is hardly maintainable, as we have seen; but in the absence of any statutory provision upon the subject, supposing the municipality to have no property liable to execution, after judgment is obtained against it, a writ of *mandamus* may be had to compel the corporate authorities to levy a tax in order to satisfy the demand. (*Ante*, p. 539; 2 Dill. Mun. Corp. §§ 686, n. 1, 446; Benbow v. Iowa City, 7 Wal. 314, and cases cited; Meriwether v. Garrett, 12 Otto (102 U. S.), 472, 511 & seq.)

2°. Nature and Transfer of Stock in *Joint-Stock Corporations*.

In corporations constituted for municipal or eleemosynary or religious purposes and the like, although the bodies may be possessed of vast wealth (*e. g.* the corporation of Trinity Church in New York), yet the individual corporators have no separate interest therein, but are mere trustees for the purposes of the charter. But companies organized for business purposes, and for profit to their members, consist usually of persons who have taken shares in the enterprise, and are with us denominated *joint-stock companies*. The principles which regulate the *subscription* for shares are stated *Ante*, pp. 579 & seq., and those which relate to the transfer of shares are mentioned *Ante*, pp. 573 & seq.

6°. The Visitation of Corporations.

Corporations being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons or authorities to visit, enquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. The visitorial control exercised over eleemosynary corporations, however, differs so materially from that which is applicable to such as are ecclesiastical or civil, that some writers have proposed to employ the phrase *visitation* in respect to eleemosynary corporations alone (2 Kent's Com. 304; 1 Bl. Com. 481, n's (c) and (12)); but as the idea and object of visitation is to have a controlling authority outside of the corporation itself, to

constrain it to fulfil its functions, it will probably tend more to clearness of apprehension to adopt Blackstone's view of the subject. (1 Bl. Com. 480.) Let us consider, therefore, the doctrines applicable to, (1), The visitation of ecclesiastical corporations; and (2), The visitation of lay corporations;

W. C.

1^c. The Visitation of *Ecclesiastical Corporations*.

In England the *ordinary* is the visitor of ecclesiastical corporations; that is, the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge or coercion of all his suffragan bishops; and the bishops, in their several dioceses, are the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations, a power which they usually exercise, so far as concerns coercion, through the several orders of ecclesiastical courts. (1 Bl. Com. 480; Id. 380; 81. 382; Bishop of St. Davids v. Lucey, 1 Ld. Raym. 447; S. C. Id. 539.)

In this country there are, for the most part, no ecclesiastical corporations. But if there should be any, as there are no spiritual authorities by law established with us, it is supposed they are to be visited in the same manner as such as are eleemosynary.

2^c. The Visitation of *Lay Corporations*; W. C.

Let us note the doctrine applicable to, (1), Eleemosynary corporations; (2), Civil corporations;

W. C.

1^d. The Visitation of *Eleemosynary Corporations*.

It is said that no other corporations go under the name of eleemosynary but *colleges, schools and hospitals*, and they are so only when they bestow their advantages *gratuitously*. At common law they are visited by the founder or his heirs, or as the founder shall appoint; and by the founder is commonly meant the *endower*, whom Blackstone denominates the *fundator perficiens*, in contradistinction to the crown, which is the *fundator incipiens*. If, however, the king and a private man join in an endowment, the king, by his prerogative, is to be deemed the founder, both *perficiens* and *incipiens*, and consequently the king is the visitor, and exercises his functions as such, for the most part, in the king's bench, but sometimes in the court of chancery.

In Virginia the same principles prevail. Eleemosynary corporations are visited as the founder shall direct, or in the absence of any direction, by the founder himself or his heirs, observing that if any part of the endowment is supplied by the *commonwealth*, it constitutes the commonwealth the founder and visitor, a function which it exercises through the *legislature*, and also through the *courts*,—for

the most part the *courts of law*,—and by means of the writs of *mandamus* and *quo warranto*.

The visitor appointed by the founder, or the founder and his heirs, if they act as visitors, determine finally and *without appeal* all questions relating to the interior polity and administration of the institution (1 Bl. Com. 483-'4, & n. (5); Phillips v. Bury, 1 Ld. Raym. 5; King v. Bishop of Ely, 2 T. R. 290; St. John's Col. v. Bishop of Ely, 1 Burr. 200; 2 Kent's Com. 302); but the visitor is still not beyond the reach of the law. In respect of contracts made lawfully, and trusts assumed, the courts will always constrain the observance of justice and right; and the court of chancery, by virtue of its general jurisdiction in cases of abuse of trust, and of fraud, will grant redress in such cases; and where the corporation is a mere trustee of a charity, it will, if need be, take away the trust altogether, and vest it in some other hands. (2 Kent's Com. 303-'4; Atto. Gen. v. Foundling Hosp., 2 Ves. Jr. 42; Dartmouth Col. v. Woodward, 4 Wheat. 676; Story, J.)

2^d. The Visitation of *Civil Corporations*.

Blackstone insists that civil corporations, being always founded solely by the king, the right of visitation results to him by the same rule as in eleemosynary corporations, by virtue of being such founder; his functions being exercised, as in that case, in the courts of justice. At all events civil corporations are, in fact, visited and controlled by the king's courts—usually by the court of king's bench, by means of the writs of *mandamus* and *quo warranto*.

In Virginia, also, civil corporations (whether public or private) are visited and restrained, or kept up to their duty, *in the courts*; for the most part *courts of law*, and by means of the same writs of *mandamus* and *quo warranto*. (2 Kent's Com. 403; Com'th v. James Riv. Co. 2 Va. Cas. 190; Ang. & A. Corp. (10th ed.) §§ 689 & seq., 696 & seq.)

7^b. Judicial Proceedings to Restrain and Direct Corporations in the Exercise of their Functions and Franchises; w. c.

1^c. Writ of *Mandamus*.

A writ of *mandamus* in the name of the *commonwealth* may, with us, issue from a circuit or corporation court, directed to any person, corporation, or inferior court within the State, requiring to be done some *particular ministerial act* therein specified which appertains to their duty. It is a writ of an extensively remedial nature, and issues in all cases where the party has a right to have any ministerial act done, and has no other specific and adequate means of compelling its performance, or of obtaining redress. A *mandamus*, therefore, lies to compel the admission or restoration of the party applying, to any office in a corporate

company; to academical degrees; to oblige bodies corporate to affix their common seal, etc. (3 Bl. Com. 110; *Booker v. Young*, 12 Grat. 303, 306; 3 Bl. Com. 264 '5, n. (11); V. C. 1873, ch. 151, §§ 1, &c.; V. C. 1887, ch. 144, §§ 3011, &c.; Bac. Abr. *Mandamus*, (C.) & (D.); Ang. & A. Corp. (10th ed.) §§ 697 & seq.)

2^c. Writ of *Quo Warranto*.

A writ of *quo warranto* is in the nature of a writ of right for the crown or commonwealth against one who claims or usurps any office, *franchise*, or liberty, in order to enquire by what authority he supports his claim, in order to determine the right. It lies also in the case of *non-user*, or long neglect of a franchise, or *mis-user*, or abuse of it; being a writ commanding the defendant to show *by what warrant* he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. If judgment be for the defendant, it is a judicial allowance of the franchise; but in case of judgment for the crown or commonwealth, because the party is entitled to no such franchise, or has disused or abused it, the franchise is either seized into the hands of the sovereign power, to be granted out again, or there is merely a judgment of *ouster*, to turn out the party who usurps it. (3 Bl. Com. 262 '3; V. C. 1873, ch. 61, § 55; V. C. 1887, ch. 51, § 1239; *Commonwealth v. Birchett*, 2 Va. Cas. 51; *Commonwealth v. J. River Co.* 2 Va. Cas. 190; Ang. & A. Corp. (10th ed.) §§ 733 & seq., 752 & seq.)

8^b. Dissolution of Corporations.

Any particular member may be disfranchised, as we have seen, or may lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land: or he may relinquish it by his own voluntary act of resignation or transfer. But the body politic may also itself be dissolved in several ways, which dissolution is the civil death of the corporation. Let us first inquire into the *consequences* of such dissolution, and then consider *the modes* by which it may be brought about. (1 Bl. Com. 484; 2 Kent's Com. 305 & seq.);

W. C.

1^c. The Consequences of a Dissolution of a Corporation.

Upon the dissolution of a corporation, at common law, the lands and tenements belonging to it revert to the person, or his heirs, who granted them to the corporation; whilst the chattels in *possession* go to the Crown, or, with us, to the commonwealth. (1 Bl. Com. 484.)

Several reasons are given why the lands and tenements of the corporation should *revert* to the grantor, namely: that the *law* annexes a limitation to every such grant, that if the corporation be dissolved, the grant shall come to an end, and the grantor shall have the land again, because the

cause of the grant fails; and also, that the grant is only during the *life of the corporation*, which *may* endure for ever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. It seems, however, to be merely the case of a *base or determinable fee*, with which we shall soon become better acquainted in the second volume. (1 Bl. Com. 484; 2 Do. 109; 2 Min. Insts. 77; *Bolling v. Mayor of Petersburg*, 8 Leigh, 224.)

A further consequence, at common law, of the dissolution of a corporation, is that debts due to it and debts due from it are alike lost, the defunct corporation being incapable either of suing or being sued, and the individual corporators being neither entitled to claim what is due to the body politic, nor bound for what is due from it; agreeably to the doctrine of the Roman law, "*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*" (Dig. Lib. III., 4, 7; 1 Bl. Com. 484; 2 Kent's Com. 307; *Edmunds v. Brown & al.* 1 Lev. 237; *Rider v. Union Factory*, 7 Leigh, 154; *Bank of Alexandria v. Patton*, 1 Rob. 499; *May v. State Bank of N. Carolina*, 2 Rob. 56.) Hence, if a bill against a corporation be dismissed, and pending an appeal the charter of the company expires, as by efflux of time the appeal must at common law abate, unless it be made to appear that during its existence the corporation made an assignment of its assets or of its interest in the subject in controversy. (*Rider v. Union Factory*, 7 Leigh, 154; *Bank of Alexandria v. Patton*, 1 Rob. 499; *May v. State Bank of N. Car.* 2 Rob. 56.) See, however, *Bacon v. Robertson*, 18 How. 485; *Broughton v. Pensacola*, 3 Otto (93 U. S.), 268; *Meriwether v. Garrett*, 12 Otto (102 U. S.), 512, which cases are adverse to the doctrine as stated above. They denominate it "the ancient doctrine," and hold that in the view of equity the property of a defunct corporation constitutes a trust-fund pledged to the payment of its debts, and as to the surplus to be distributed to the shareholders.

The common law doctrine in this particular, however, that is, "the ancient doctrine," is frequently modified by charter, or by statute, as we shall presently see it has been in Virginia. (2 Kent's Com. 307-8.)

The embarrassment arising from these common law consequences of the extinction of a corporation may be, and in most instances is, practically obviated by an *assignment*, which the corporation, in anticipation of its end, makes to trustees, of all its property and effects of every sort, upon trust to collect the debts due to the corporation, or to secure them by deed of trust, which is good, notwithstanding the dissolution of the corporation, to sell the property belong-

ing to it, to pay the debts due from it, and to distribute the residue amongst the corporators. Or the assignment may be to a succeeding corporation, who must pay the debts, and is entitled to recover those due to the predecessor. (Ang. & A. Corp. (10th ed.) § 779; King v. Jno. Pasmore, 3 T. R. 241 '2; Mayor, &c. of Colchester v. Seabor, 3 Burr. 1866; Mayor, &c. of Scarborough v. Butler, 3 Lev. 237; Rider v. Union Factory, 7 Leigh. 154; May v. State Bank of N. Carolina, 2 Rob. 56; Bank of Alexandria v. Patton, 1 Rob. 499; Barksdale & als. v. Finney, 14 Grat. 338; Zantzinger v. Gunton, 19 Wal. 32.)

In Virginia, this result is accomplished in most cases by statute, which enacts that "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debts among those entitled thereto." (V. C. 1873, ch. 56, § 31; V. C. 1887, ch. 46, § 1103.)

A corporation having been dissolved, may be, of course, *revived again* by the charter-making power, or a *new one* may be created with the same name, the same members and officers, the same object and purpose, and the same capacities; but it is very material to distinguish whether it is the one or the other. If it be a *revival* of the old corporation, all the rights and responsibilities thereof are revived with it; whereas, if it be a *new charter* of incorporation, notwithstanding the identity of name and other particulars, none of the rights and obligations of the former attach to it, unless, indeed, it be so provided in the new charter, and the same be accepted. And in order to ascertain whether a *new corporation* is created, or only a former one *revived*, the terms of the charter must be considered, and the legislative intent explored by the established rules of construction. But wherever a corporation succeeds to the *rights* of a predecessor, it succeeds as a general rule, to its *liabilities* also; with an exception, created by statute, in the case of the purchaser of a railroad, or other work of internal improvement, made under a mortgage or deed of trust, or under a decree of a court of equity. (V. C. 1873, ch. 61, §§ 44-47; V. C. 1887, ch. 51, §§ 1233 to 1236; King v. Pasmore, 3 T. R. 241 '2, 247 to 249; Wyman v. Hallowell & A. Bank, 14 Mass. 58; Hopkins v. Swansea Corp. 4 M. & Welsby, 621; Broughton v. Pensacola, 3 Otto (93 U. S.), 266; J. Riv. &

Ka. Co. v. Early, 13 Grat. 541 ; Wilson v. Ches. & O. R. R. Co. 21 Grat. 660 & seq.; Barksdale v. Finney, 14 Grat. 358-'9.)

2^c. Modes of Dissolving Corporations.

It will be needful to discriminate here between *public* and *private* corporations, the precise difference between which has been already set forth. (See *Ante*, pp. 537-'8; J. Riv. & Ka. Co. v. Early, 13 Grat. 552-'3.)

W. C.

1^d. Mode of Dissolving Public Corporations.

The modes of dissolving public corporations are these five, namely: (1), By act of the legislature; (2), By the loss of all its members, or of an integral part of itself, by death or otherwise; (3), By the surrender of its franchise to be a corporation; (4), By forfeiture of its franchise by non-user or mis-user; and (5), By expiration of the period limited by its charter or by general law. And of these five modes, the last four are identical with those applicable to *private* corporations. The first mode only,—namely, by *act of the legislature*,—presents a material diversity;

W. C.

1^e. Dissolution of Corporations by *Act of Legislature*.

The main distinction, it will be remembered, between public and private corporations is, that over the former the legislature, as the trustee and guardian of the public interests, has *exclusive and unrestrained control*; and as it may *create* by the exertion of its own will, so it may *modify or destroy* them, as public exigency requires or recommends; whilst the charters of private corporations, on the other hand, are regarded as *contracts*, and, as we have seen, are protected by that clause of the constitution of the United States (Art. I., § x. 1), which forbids a State to pass any law *impairing the obligation of contracts*. (Fletcher v. Peck, 5 Cr. 88; Terrett v. Taylor, 9 Cr. 43; Dartmouth Col. v. Woodward, 4 Wheat. 518, 694 & seq.; Richmond, Fred. & Pot. R. R. Co. v. Louisa R. R. Co. 13 How. 71; Yeaton v. Bank of Old Dominion, 21 Grat. 598-'9; City of Richmond v. Danville R. R. Co. 21 Grat. 604.)

Thus, a *municipal corporation*, such as a city, town, county, school district, &c., being public, is subject thus to be dissolved or modified at the discretion of the legislature. (Ang. & A. Corp. (10th ed.) § 31; 1 Dill. Mun. Corp. § 30; People v. Morris, 13 Wend. (N. Y.) 325; Comm'rs v. Lucas, 3 Otto (93 U. S.), 108; U. S. v. R. R. Co. 17 Wal. 322; Meriwether v. Garrett, 12 Otto (102 U. S.), 511; City of Richmond v. Richmond & Danville R. R. Co. 21 Grat. 610 & seq. 617.) So also is any corporation created exclusively for *public purposes*, and en-

dowed even in part with *public funds*, such as the University of Virginia, the Virginia Military Institute, the Board of Education (save in so far as the constitution regulates it), the insane asylums at Staunton, Williamsburg, &c., the Deaf, Dumb and Blind Asylum, &c. The corporation is not *public*, however, where the *design of it is gain*, merely because the government is a *shareholder* therein, as in case of a bank or internal improvement company. In such case, even though the government owns the *whole stock*, it does not impart to the corporation any of the attributes of its own sovereignty, such as non-liability to be sued, etc., although, being the *sole proprietor*, the government is of course competent to modify or abolish it at pleasure. (Bank of U. S. v. Planters Bank of Georgia, 9 Wheat. 907; Bank of Kentucky v. Wistar & als. 2 Pet. 318; Bank of U. S. v. McKenzie, 2 Brock. R. 393; Dunningtons v. N. W. Road 6 Grat. 170-71; Richmond v. Danville R. R. Co. 21 Grat. 604. See Sayre v. N. W. Turnpike, 10 Leigh, 454; Boulton v. Crowther, 2 B. & Cr. (9 E. C. L.) 703; Plate Glass Co. v. Meredith, 4 T. R. 794; Lansing v. Smith, 8 Cow. 146.)

But whilst the charter of a private corporation, by virtue of its being a *contract* is incapable of being repealed by the legislature, unless there be a provision to that effect inserted in the charter or in a general statute anterior to the charter, yet with such a provision any repeal or modification may be validly made which is within the limits of the provision. Hence it is provided with us that the charter of manufacturing and mining companies shall be in force for thirty years, but any time after fifteen years from their organization may be amended or repealed at the pleasure of the General Assembly. (V. C. 1887, ch. 47, § 1143.) And as to internal improvement companies, their charters are liable to be altered, modified, or repealed at any time, as to the legislature shall seem proper, except that no law shall be passed for taking from a company its works or property without making just compensation, or for changing its tolls without its assent except as specially provided for in *this chapter*, ch. 51. (V. C. 1887, ch. 51, § 1240.)

2^c. Dissolution of Corporation by the Loss of *all its Members*, or of an *integral part* of itself, by death or otherwise.

By the death of *all its members* a corporation aggregate, other than a *joint-stock company*, is always dissolved. In the case of a *joint-stock company*, the shares are transmitted to the personal representatives of the shareholders, so that the death of the latter does not interrupt the suc-

cession. The death of all the members extinguishes the corporation only where the corporators have no separate property therein. And in such cases also the corporation is dissolved when, from death or disfranchisement, so few members remain that by the charter they cannot continue the succession; and in Virginia if any company incorporated by the General Assembly, be not organized by the appointment of a president and directors within two years from the enactment of its charter, or if it suspends its operations for two years, its corporate rights and privileges shall cease. (V. C. 1887, ch. 47, § 1141.) So also the corporation is dissolved where one of several necessary *integral parts* is lost. (Colchester v. Seabor, 3 Burr. 870; S. C. 1 Wm. Bl. 591; Rex v. Pasmore, 3 T. R. 241; Rex v. Miller, 6 T. R. 278; Rex v. Morris, 3 East. 216; Strata Marcella, 9 Co. 25 b; 2 Kent's Com. 309.)

The dissolution of a corporation from the loss of a portion of its members, or of one or more of its *integral parts* (that is, *distinct parts*, without *every one* of which the body is incomplete—e. g., a corporation consisting of *mayor, aldermen and commonalty*), results from the incapacity of the body, in its imperfect state, either to act or to restore itself by a new election. Wherever, therefore, the corporation may restore itself, or be restored by a new election or appointment, although until so restored it may be *suspended*, yet it is not *extinguished*. (Com. Dig. Franchise, (G. 4); Rex v. Pasmore, 3 T. R. 241, 243; Phillips v. Wickham, 1 Pai. Ch. R. (N. Y.) 595-7; Slee v. Bloom, 19 Johns. (N. Y.) 459.)

This method of dissolution is as applicable to *private* as to *public* corporations, save only that, in the United States especially, it is not *customary* to have even *municipal* corporations, and much less *private ones*, composed of *integral parts*; for where a corporation is designated by such a title as "The President, Directors & Co.," etc., the president and directors are not generally *integral parts*, and their non-existence by no means supposes even the *suspension*, much less the *extinction*, of the body politic. (Phillips v. Wickham, 1 Pai. Ch. R. (N. Y.) 590; Russell v. McClellan, 14 Pick. (Mass.) 63.)

3°. Dissolution of a Corporation by the Surrender of its *Franchise to be a Corporation*.

The *capacity* of a *municipal* corporation to surrender its corporate existence has been in England much questioned (Ang. & A. Corp. (10th ed.) § 772; 1 Dill. Mun. Corp., §§ 109, 110 & seq.; 2 Do., § 720; Rex v. Amery, 2 T. R. 531, 632); but the better opinion is, that where duly made, the surrender is effectual to dissolve the municipal body. (Rex v. Miller, 6 T. R. 277; Rex v. Haw-

thorne, 5 B. & Cr. (11 E. C. L.) 410; Butler v. Palmer, 1 Salk. 191; Newling v. Francis, 3 T. R. 196 '7; Rex v. Holland, 2 East, 72; Rex v. Osborne, 4 East, 335; Meriwether v. Garrett, 12 Otto (102 U.S.) 472; 2 Kent's Com. 309 & seq. But see 1 Dill. Mun. Corp., §§ 109, 110 & seq.; 2 Do. § 720.)

The power of a *private* corporation to make such surrender appears never to have been doubted. (2 Kent's Com. 311; Mumma v. Pot. Co., 8 Pet. 281; Slee v. Bloom, 19 Johns. (N. Y.) 456; McLaren v. Pennington, 1 Pai. Ch. R. (N. Y.) 107; Riddle v. Merrimac Locks, 7 Mass. 185; Hampshire v. Franklin, 16 Mass. 86.)

It seems that the *officers* of a corporation cannot dissolve it without the consent of the corporators, any more than they can assign its effects, etc., without such assent; and in all cases where the officers, and in many where the majority of corporators are proceeding to act in a manner destructive of the corporation, or perversive of its purposes, a court of equity will intervene, by process of injunction, at the instance of one or more corporators, to prevent the wrong. (Ang. & A. Corp. (10th ed.) § 772; Smith v. Smith, 3 Dessaus. (S. C.) 557; Balt. & O. R. R. Co. v. Wheeling, 13 Grat. 40; Stevens v. Davidson, 18 Grat. 819.)

The surrender, in England, is to be made by deed *to the king*; and forasmuch as the crown can take nothing save by matter of record, the deed avails not until *it is enrolled*. Nor is the surrender effectual *until it is accepted*. The same *principles* are applicable in the United States, but the books do not indicate the mode whereby the surrender is to be made, nor how the acceptance is to be signified. (Butler v. Palmer, 1 Salk. 191; Revere v. Boston Copper Co., 15 Pick. (Mass.) 351; Boston Glass Manfg Co. v. Langdon, &c. 24 Pick. 49; Ward v. Sea Ins. Co. 7 Pai. Ch. R. (N. Y.) 294; Ang. & A. Corp. (10th ed.) § 773; 2 Kent's Com. 310-'11.)

Mere *non-user* of its franchises is not *per se* a surrender, nor in general does it justify the inference of a surrender, in the absence of anything in the charter to give it such effect. (University of Md. v. Williams, 9 Gill & Johns. (Md.) 365; Ang. & A. Corp. (10th ed.) § 773.) Neither does the sale of all the visible and tangible property of the corporation, although accompanied by its insolvency and a neglect to hold meetings and elect officers; (Brinckenhoff v. Brown, 7 Johns. Ch. R. (N. Y.) 217; State v. Bank of Md. 6 Gill & Johns. (Md.) 205; Boston Glass Manfg Co. v. Langdon, 24 Pick. (Mass.) 49); nor the sale under execution of part, or the whole, of the company's works, etc., as *e. g.*, of a railroad belong-

ing to a railroad corporation (*State v. Rives*, 5 Ired. (N. C.) 309); nor one or two individuals acquiring the whole of the stock, unless where the number of corporators is limited (as formerly it was in Virginia, although by the Code of 1887, it is no longer), in the case of mining and manufacturing companies to the number of five, etc. (*Russell v. McClellan*, 14 Pick. (Mass.) 63; *Oakes v. Hill*, Id. 442; *Spencer v. Campion*, 9 Cow. (N. Y.) 536; *Wilde v. Jenkins*, 4 Pai. Ch. R. 481; V. C. 1873, ch. 57, § 36; V. C. 1887, ch. 47, § 1141); nor in case of a *joint-stock company*, where the members have respectively a *separate property interest*, all the members *dying at the same instant of time*, for their respective personal representatives immediately succeed to their several shares (*Russell v. McClellan*, 14 Pick. (Mass.) 63); nor a vote of the majority to dissolve it, and close its concerns, the assignment of its effects to trustees, and giving notice to the executive department of the government that the corporation claims no further interest in its charter, at least so as to avoid its existing engagements or debts. (*Revere v. Boston Copper Co.* 15 Pick. (Mass.) 351; *Campbell v. Miss. Union Bank*, 6 How. (Miss.) 681.)

On the other hand, an act of the legislature repealing the act of incorporation (*with the assent of the corporation*), would undoubtedly be a sufficient surrender. (*Riddle v. Proprietors of Locks, &c.*, 7 Mass. 185; *McLaren v. Pennington*, 1 Pai. Ch. R. (N. Y.) 107; *Dartm. Col. v. Woodward*, 4 Wheat. 518.) And for *some purposes* it is a surrender, if the corporation suffer acts to be done which defeat the end for which it was instituted; *e. g.*, where by statute all debts due by the company at its dissolution are charged on the persons individually who *then compose it*; and the company being indebted, suffer all its property to be sacrificed, omit the periodical elections, and take no step looking to a resumption of the corporate functions; such acts constitute a surrender in order to ascertain *who are personally responsible* for the corporation debts. (*Slee v. Bloom*, 19 Johns. (N. Y.) 456; *Penman v. Briggs*, 1 Hopk. Ch. R. (N. Y.) 300; S. C. 8 Cow. (N. Y.) 387; 2 Kent's Com. 311-'12.)

- 4°. Dissolution of a Corporation *by Forfeiture*, for *Non-user*, or *Mis-user*, of its Franchises.

Although it was once doubted whether the *being* of a corporation would be forfeited by a misapplication of the powers entrusted to it, it is now well settled that it is a *tacit condition* of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as

for condition broken. (Rex v. Saunders, 3 East. 119; Rex v. Amery, 2 T. R. 515; Rex v. Pasmore, 3 T. R. 246; Terrett v. Taylor, 9 Cr. 51, 52; Dartm. Col. v. Woodward, 4 Wheat. 658 '9; Com'th v. F. & M. Ins. Co. 5 Mass. 230; People v. Manhattan Co. 9 Wend. (N. Y.) 351; Ch. Riv. Br. v. Warren Br. 7 Pick. (Mass.) 371; 1 Bl. Com. 485; Ang. & A. Corp. (10th ed.) § 774.) And if the charter, with its franchises and property, is forfeited by virtue of the condition *implied*, *a fortiori* is it forfeited by virtue of a condition *express*; and when the default stipulated against occurs, the commonwealth, by its officers, may enter and take possession, without inquisition or any other judicial proceeding; nor can the company obviate or in any wise affect the commonwealth's right thus to enter and appropriate the property and rights of the corporation, by executing a mortgage or deed of trust to secure its creditors, who must be taken to have had notice of the condition. (Silliman v. Fred. Or. & Ch. R. R. Co. 27 Grat. 126, 132; Stoats v. Board, 10 Grat. 400; Wilde v. Serpell, 10 Grat. 405; Hale v. Branscum, 10 Grat. 418.) It is, indeed, an established and universal principle, that one dealing with a corporation must take notice of whatever is contained in the law of its organization, and is supposed to be informed as to the restrictions and conditions annexed thereto. (Pearce v. Madison & Ind. R. R. Co. 2 How. 441; Zabriskie v. Cleveland R. R. Co. 23 How. 381; The Floyd Acceptances, 7 Wal. 680; Silliman v. Fred. Or. & Ch. R. R. Co. 27 Grat. 130.)

The acts, respectively, of neglect, or *non-user*, and of *mis-user*, or abuse, which will be causes of forfeiture, can only be illustrated by a few examples of each. Thus, the omission or refusal of a corporation to set forth the right by which it claims its corporate franchises, when called on in a court of justice so to do (Rex v. Amery, 2 T. R. 567); the suspension by a bank of specie payments, when such payments are required by the charter (Ang. & A. Corp. (10th ed.) §§ 774, 775); the suspension of business for more than a year, by formal resolution of the board of direction, on the part of a marine insurance company, (Ward v. Sea Ins. Co. 7 Pai. Ch. R. (N. Y.) 294); the contracting of debts, or issuing of bills by a bank, to a larger amount than the charter allows; embezzling deposits; making large dividends while debts are denied payment; loaning money to its directors, contrary to law; or making an assignment of its effects, or being otherwise insolvent (Bank Comm'rs v. Banks of Buffalo, 6 Pai. Ch. R. (N. Y.) 497; People v. Hudson Bank, 6 Cow. (N. Y.) 217; People v. Niagara Bank, Id. 196; Ang. & A. Corp. (10th ed.) § 775); non-compliance on the part of a turn-

pike or railroad company with the requirements of the charter, touching the construction or repairs of the road (People v. Kingston & M. Turnpike Co. 23 Wend. (N. Y.) 193; People v. H. & C. Turnpike Co. Id. 254; Ang. & A. Corp. (10th ed.) § 776); a railroad company suffering its road to be sold on execution, and broken up in whole or in part (Ang. & A. Corp. (10th ed.) § 776; State v. Rives, 5 Ired. (N. C.) 309); *dis-user* of the corporate franchise for a time such as may be designated by law, *e. g.*, in Virginia, dis-user of a ferry for *two years and a half* (Ang. & A. Corp. (10th ed.) §§ 774 & seq.; State v. Rives, 5 Ired. 309; V. C. 1873, ch. 64, § 11; V. C. 1887, ch. 62, § 1374)—all these are causes of forfeiture of the charter. And it is now enacted with us by the Code of 1887, that if any company incorporated by the General Assembly be not organized by the appointment of a president and directors within two years from the passage of the act of incorporation, or, though so organized, it shall suspend its operations for two years, its corporate rights and privileges shall cease. (V. C. 1887, ch. 47, § 1141.)

In general, the abuse or neglect must be something more than accidental or casual negligence, excess of power, or mistake in its exercise. In order to make a forfeiture, there must be something wrong arising from *wilful abuse, or improper and persistent neglect*. A single act of *abuse or of wilful non-feasance* is a cause of forfeiture, if it be insisted on; but a single act of non-feasance, not committed *wilfully or negligently*, nor producing, nor tending to produce, serious mischief, and not being contrary to the requisitions of the charter, will not work a forfeiture. (Ang. & A. Corp. (10th ed.) § 776; People v. Bristol & R. Turnpike Road, 23 Wend. (N. Y.) 222; Bank Comm'rs v. Banks of Buffalo, 6 Pai. Ch. R. 497; Ward v. Sea Ins. Co. 7 Do. 294.)

- 5°. Dissolution of a Corporation by the Expiration of the Period limited for its Duration by its Charter, or by general Law.

Upon dissolution of the corporation in this mode, all the usual consequences follow, such as forfeiture of property, extinguishment of debts, and abatement of pending suits, unless provided for by the terms of the charter, or by a general law, or by an assignment to a trustee for the collection and payment of debts, and for the use of the shareholders. (Ang. & A. Corp. (10th ed.) § 778 a; Bank of Miss. v. Wrenn, 3 Smedes. & M. 796.)

It is worthy of observation in this connection that, although a corporation be created for only a term of years, yet a grant of land to it purporting to convey a fee-simple will pass a fee-simple, subject, however, upon

dissolution, where there is no provision of law to the contrary (as there now is in Virginia (V. C. 1887, ch. 46, § 1103)), and no assignment to a trustee, to revert to the grantor or his heirs. (Ang. & A. Corp. (10th ed.) § 778; Nicoll v. N. York R. Co., 12 Barbour (N. Y.) 460.)

Causes of forfeiture do not, in general, operate *per se*, nor can they even be taken advantage of *collaterally or incidentally*, or in any other mode than by a *direct proceeding*, instituted for the purpose, against the corporation, so that it may have an opportunity to answer. And that proceeding can be instituted by *no one but the government which created the corporation*, which, if it thinks fit, may waive the forfeiture, and may do so by *plain implication*, as well as *expressly*, as by subsequent legislative acts recognizing the continued existence of the corporation, etc., although this doctrine must be taken in subordination to the charter, if that *expressly declares* that any act of *abuse or neglect* shall *ipso facto* operate a forfeiture. (Rex v. Staverton, Yelv. 190 & n. (1); King v. Carmarthen, 1 Wm. Bl. 187; S. C. 2 Burr. 869; King v. Amery, 2 T. R. 515; Rex v. Pasmore, 3 T. R. 244; Terrett v. Taylor, 9 Cr. 51; Banks v. Poitiaux, 3 Rand. 142; Crump v. U. S. Min. Co., 7 Grat. 352; Pixley v. Roanoke Nav. Co. 75 Va. 325; Soc. for Prop. Gospel v. N. Haven, 8 Wheat. 464, 483-4; 2 Kent's Com. 312; Ang. & A. Corp. (10th ed.) § 776.)

The forfeiture of the charter can be enforced in a *court of law alone*. A court of chancery may hold a corporation to account, as trustee, for abuse of trust, but cannot divest it of its corporate character, unless specially authorized by statute so to do, as in New York it is. (King v. Whitwell, 5 T. R. 85; Atto. Gen. v. Clarendon, 17 Ves. 491; Pixley v. Roanoke Nav. Co. 75 Va. 325; Slee v. Bloom, 5 Johns. Ch. R. (N. Y.) 380; 2 Kent's Com. 313-14.)

The mode of proceeding against a corporation, in order to enforce a forfeiture of its corporate franchise, is either by *scire facias*, or by information in the nature of a *quo warranto*. There seems, however, to be no material diversity in their use; and in Virginia the latter has been more frequently employed. (1 Bl. Com. 485; Rex v. Pasmore, 3 T. R. 244, 245; People v. Bank of Niagara, 6 Cow. (N. Y.) 196; People v. Bank of Hudson, Id. 217; Id. 211; V. C. 1873, ch. 61, § 55; V. C. 1887, ch. 51, § 1239; Commonwealth v. Birchett, 2 Va. Cas. 51; Commonwealth v. J. River Co. 2 Va. Cas. 190; 3 Kent's Com. 313.) See Earl of Rutland's Case, 8 Co. 55 a, where the question as to the *right to an office* was

determined upon a writ of *assize of novel disseisin*, as between the two rival claimants.

2^d. Modes of dissolving private corporations.

The modes of dissolving *private corporations* are the same as in the case of *public corporations*, save only as to dissolution *by act of the legislature*, which, in the *United States*, by virtue of the Federal constitution, is not applicable to dissolve *private*, as it is to extinguish *public* corporations.

The charter of a *private corporation* is, as we have seen, a *contract*, and, therefore, to alter or repeal it without the consent or default of the corporators, except where the power to do so is reserved in the charter, or by general statute, is to *impair the obligation of contracts*, which the constitution of the United States (Art. I, § x, 1) forbids *any State* to do. This clause of the constitution had been enforced in *Fletcher v. Peck*, 6 Cr. 87, against the State of Georgia, which sought to cancel a land-grant which it had previously made; and in *N. Jersey v. Wilson*, 7 Cr. 164, against the State of New Jersey, which wished to evade an exemption from taxes which it had granted; but the doctrine had not been applied to *corporations* and their charters, until the very noted case of *Terrett & als. v. Taylor & als.* 9 Cr. 53 & seq., where the validity of the acts repealing the acts incorporating the Episcopal churches in Virginia, and appropriating their property to public uses, came under the examination of the supreme court of the United States, and the acts were pronounced unconstitutional, as *impairing the contracts* contained in those charters. "A private corporation," said C. J. Marshall, in delivering the opinion of the court, "created by the legislature, may lose its franchises, by *mis-user* or *non-user* of them; and they may be resumed by the government under a judicial judgment, upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are *inconsistent with the new government* may be abolished. In respect, also, to *public corporations*, which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous

laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, *without the consent or default* of the corporators, we are not prepared to admit. And we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the *spirit and letter* of the constitution of the United States, in resisting such a doctrine." See also *Ante*, p. 535. But the leading and principal case on the subject is that of *Dartmouth College v. Woodward*, 4 Wheat. 518.

The case of *Dartmouth College v. Woodward* originated in an attempt of the legislature of New Hampshire to modify, without consent of the corporators, the charter of Dartmouth College, granted in 1769 by the royal authority. In pursuance of certain acts of the legislature of New Hampshire, of 27th June and 18th December, 1816, changing the charter of the college, which acts had been enacted without the consent of the existing trustees, who constituted the corporation, one Woodward had obtained possession of the book of records, corporate seal, and other corporate property of the college, and refusing to surrender them upon the demand of the old trustees, they instituted against him an action of trespass on the case in *trover and conversion* to recover the value. The jury found a special verdict, setting forth the origin of the institution; the manner of its endowment (which was exclusively by private persons in New Hampshire and in England); the charter of 1769 granted by the crown; and the acts of the New Hampshire legislature of June and December, 1816, proposing to modify the charter, which were without the assent and contrary to the wishes of a majority of the trustees then composing the corporation; and estimating the value of the property withheld by Woodward at \$20,000, submitted to the court the question whether the law was for the plaintiffs or for the defendant. The New Hampshire courts deemed the acts of 1816 valid, and gave judgment, therefore, *for the defendant*; and to that judgment of the supreme court of New Hampshire, the trustees, in pursuance of the 25th section of the judiciary acts of 1789 obtained a writ of error from the supreme court of the United States, because there had been drawn in question in the State court the validity of an act of the State legislature, on the ground of its repugnance to the constitution of the United States, and the decision of the State court had been *in favor of its validity*. The question was then discussed at great length, and with consummate ability, in the supreme court of the United States, by Mr. Webster and Mr. Hopkinson for the college, and

Mr. Holmes and Mr. Wirt for Woodward. The judgment of the court was pronounced by Chief-Justice Marshall, with only one dissentient from the conclusion, although Washington and Story, J. J., gave separate opinions, somewhat varying the grounds of decision.

The judgment of the supreme court of the United States was,—

1, That the charter granted by the crown to Dartmouth College in 1769 made it a *private corporation*, and was a *contract* within the meaning of that clause of the constitution of the United States (Art. I. § x. 1), which declares that no State shall make any law *impairing the obligation of contracts*;

2, That the charter was not dissolved, nor affected by the Revolution; and

3, That the act of the New Hampshire legislature, altering the charter without the consent of the corporation, in a material particular, was an act impairing the obligation of the charter, and was *unconstitutional and void*.

The judgment of the supreme court of New Hampshire was, therefore, reversed, and the supreme court of the United States, proceeding to give such judgment as the court below ought to have given, it was “considered by the court that the said trustees of Dartmouth College do recover against the said William Woodward the aforesaid sum of twenty thousand dollars, with costs of suit.”

These doctrines have ever since been recognized as those which are to govern all cases of *private corporations*; but it has never been considered that they apply to prevent the exercise of the right of *eminent domain* on the part of a State, whereby a corporate franchise may be appropriated, in whole or in part, for public uses, upon providing a *just compensation*. The grant of a franchise is of no higher order, and confers no more sacred title, than the grant of land to an individual; and when the public necessities require it, the one as well as the other may be taken for public purposes, subject only to the condition of making *just compensation*, as in case of the appropriation by the public of other subjects of property. A franchise is property, and is to be protected like other property, neither more nor less. (West. Riv. Br. Co. v. Dix & al. 6 How. 534 & seq.; Richmond, &c. R. R. Co. v. Louisa R. R. Co., 13 How. 83; The Binghamton Bridge, 3 Wal. 73 & seq.; Stokes v. Upper Appom. Co. 3 Leigh, 337; Tuckahoe Can. Co. v. Tuckahoe R. R. Co. 11 Leigh, 74-5 & seq.; James Riv. & Ka. Co. v. Thompson & al. 3 Grat. 270; Boston Water Pow. Co. v. Worcester R. R. 23 Pick. (Mass.) 360-61; 7 Pai. Ch. R. (N. Y.) 45; Gov. & Co. &c. v. Meredith, 4 T. R. 794.)

One further question remains to be considered, viz., whether it is competent to a State to grant a *real franchise* which shall impair or destroy one previously granted. The New York courts strenuously insisted that it was not; that a franchise once vested, not only could not be divested without consent of the owner, or his default, but that it could not be encroached upon and rendered less valuable *by rivalry*, being deemed in its nature a *monopoly*, whether expressly made such or not. They held all statute privileges to come within the equity of this principle. No rival road, bridge, ferry, or other similar establishment they held, could be tolerated so near to one previously subsisting as materially to affect or impair its profits. It operated, they declared as a *fraud upon the grant*, and went to defeat it. (N. Bingham Turnpike Co. v. Miller, 5 Johns. Ch. R. (N. Y.) 111; Ogden v. Gibbons, 4 Johns. Ch. R. 160.)

These principles have received little countenance elsewhere, and it is the generally accepted doctrine in this country that no grant of a franchise is *exclusive*, unless it is *plainly declared to be so*. Monopolies, and exclusive privileges in the nature of monopolies, are not favored by the common law, nor by the interest of society. A government is *not to be presumed* to design to relinquish or circumscribe its rightful power or control in promoting the advantage of the community, any further than it has plainly and clearly indicated, without the necessity of resorting to remote inference and construction. This reluctance to carry exclusive privileges and public grants beyond their certain import is well illustrated in England in the case of Stourbridge Can. v. Wheeley & al. 2 B. & Ad. (22 E. C. L.) 793, and in several cases in the supreme court of the United States *u. g.* Jackson v. Lamphire, 3 Pet. 289; Beatty v. Lessee of Knowles, 4 Pet. 168; Prov. Bank v. Billings & al. 4 Pet. 514; U. S. v. Arredond, 8 Pet. 738). And in Chas. River Bridge v. Warren Free Bridge, 11 Pet. 544 & seq., it was directly determined by the supreme court of the United States, that *no franchise was exclusive unless so ascertained to be by the unmistakable terms of the grant*, therein affirming the opinion previously pronounced in the same case by the supreme court of Massachusetts. (7 Pick; 371.) The supreme court of the United States has often reiterated this same doctrine, as in Richmond, &c. R. R. Co. v. Louisa R. R. Co. 13 How. 71; and in Turnpike Co. v. The State, 3 Wal. 210; Rice v. R. R. Co. 1 Black, 358; Jefferson Br. Bank v. Skilly, 1 Black, 436. And in Virginia it is the firmly established doctrine of the law. (Stokes v. Upper Appom. Co. 3 Leigh, 337; Tuckahoe Can. Co. v. Tuckahoe R. R. Co. 11 Leigh, 69; Trent

v. Cartersville Bridge Co. 11 Leigh, 521.) But when, on the other hand, the legislature, whether by express and direct terms, or by phraseology less direct, but still leaving no reasonable doubt on the mind, manifests clearly an intention to make a franchise a monopoly, it is one accordingly, and may not be invaded, nor circumscribed, without impairing the obligation of the contract, which no State legislature can do. (The Binghamton Bridge, 3 Wal. 77 & seq.)

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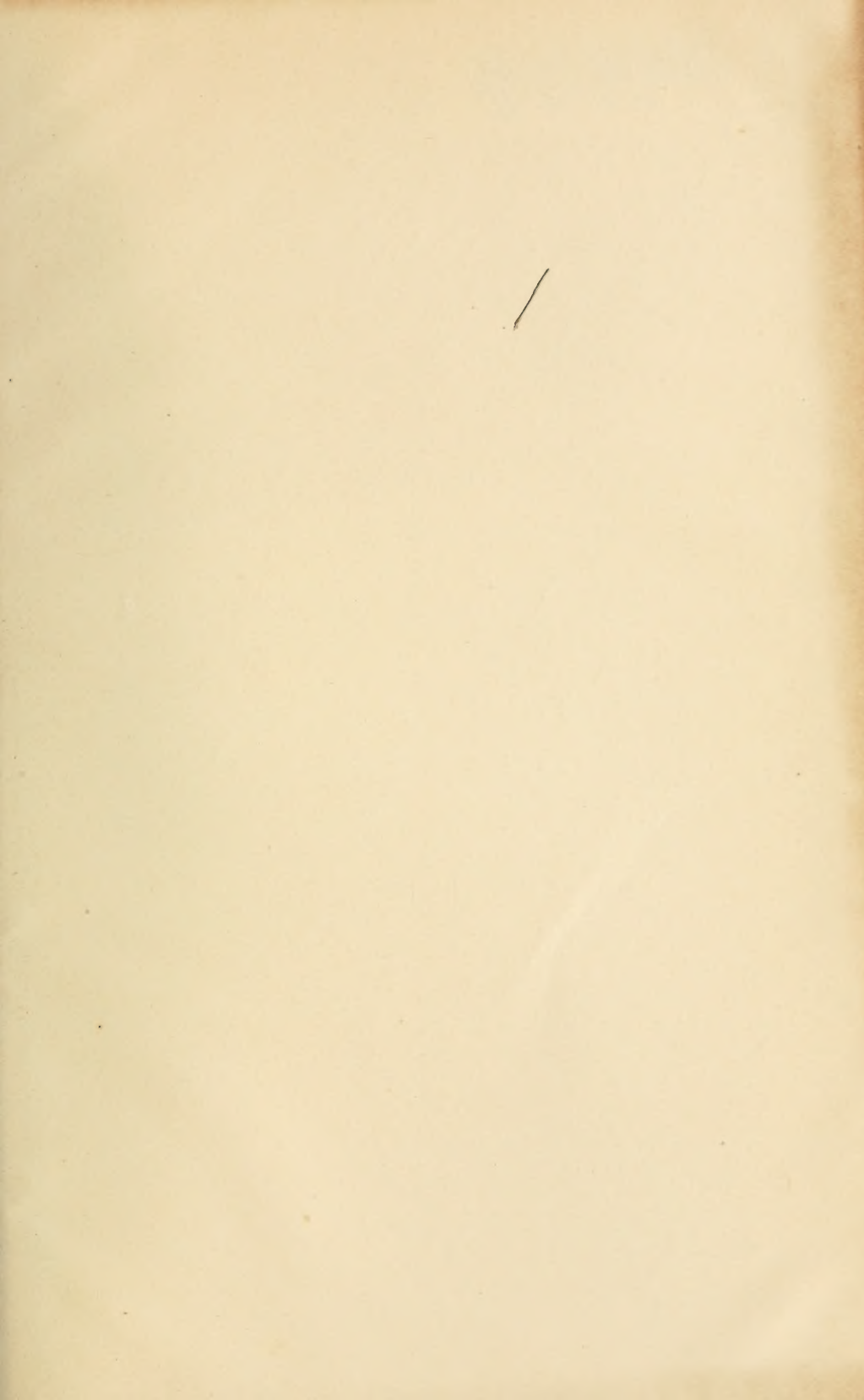
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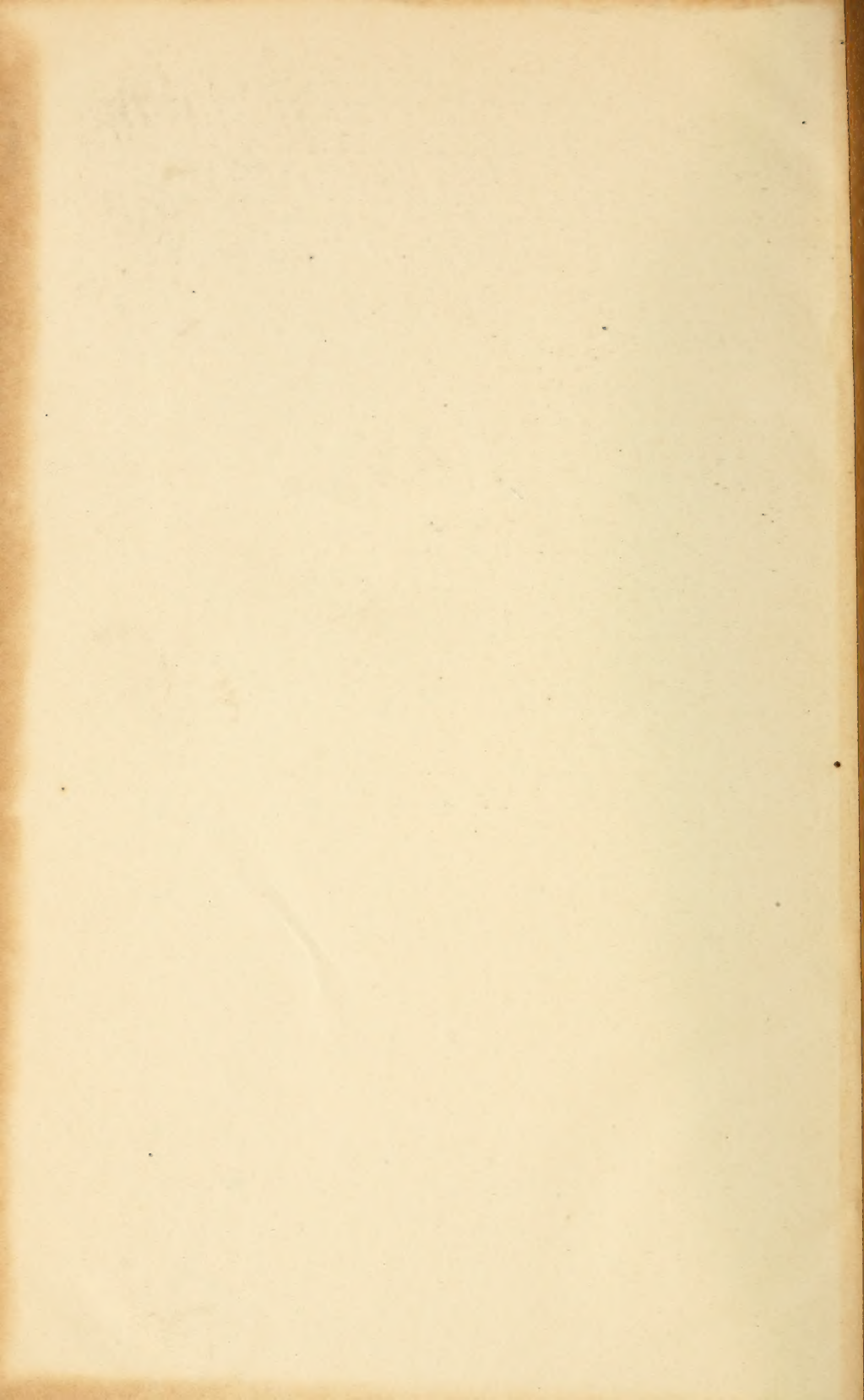
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